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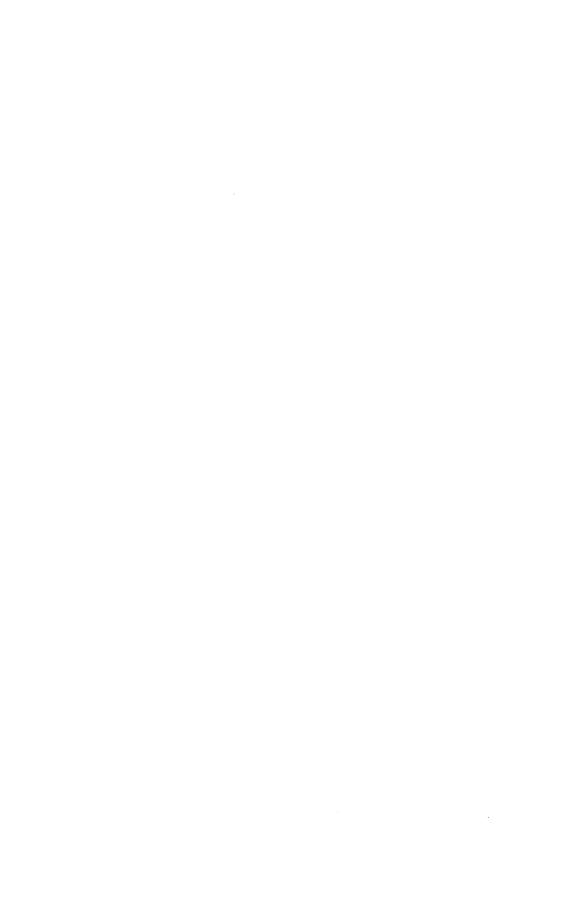






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DECISIONS

OF THE

SUPREME COURTS OF ENGLAND AND SCOTLAND,

ON THE

LIABILITY OF PROPRIETORS, MASTERS, AND SERVANTS, FOR REPARATION OF INJURIES ARISING FROM ACCIDENTS

AND THE NEGLIGENCE OF PARTIES;

INCLUDING CASES OF
RAILWAYS, COAL-PITS, ROAD AND HARBOUR TRUSTS,
AND PUBLIC CORPORATIONS.

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MDCCCLX.

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PREFACE.

THE design of this work has been to put together, in a condensed form, the leading decisions in the Supreme Courts of England and Scotland, in cases of liability for the reparation of injuries to the person, arising from accidents and negligence. The decisions include the various circumstances in reference to owners of property, employers and employed, under which questions of that nature have generally arisen.

This branch of the law has of late assumed much practical importance, and its principles have been the subject of so much discussion, both here and in England, that the practitioner has in a manner lost his way in the conflict of opinion. The decisions are voluminous and wide spread; and the English cases, more particularly, are necessarily beyond the reach of the great body of the profession. A condensed Chronological Report of the cases seemed necessary for general use, and it has been here attempted. The facts of the cases are given with the pleas of the parties, while the opinions of the Judges, explanatory of the decision, are given in some instances at considerable length, and so as to be sufficient for all practical purposes of reference.

Had the scope of the work permitted, several very excellent decisions of Sheriffs might have been given; but as the intention has been to give the Decisions of the Supreme Courts only, this otherwise very desirable object cannot be attained. In some districts where many of the population are engaged in mining and manufacture, and in constant contact with intricate machinery, it is desirable that the law should be administered in conformity with fixed principles and precedent. Here-

tofore, undoubtedly, there has been much uncertainty, rendering the position of the professional adviser one of great difficulty in this branch of the law.

Besides the Decisions, a short Summary or Digest of Propositions in the law, as deduced from the cases, and arranged under distinct heads, has been attempted, while references have been given by which errors may be corrected. The object being to give, as shortly as possible, the result of the cases, it is hoped that the attempt, necessarily defective, may, nevertheless, be of some use in leading to a correct understanding of a subject admitted on all hands to be so full of difficulties, and in regard to which our most eminent Judges, in both countries, have differed in opinion.

November, 1860.

TABLE OF CONTENTS.

CHAPTER I.

LIABILITY OF MASTERS	FOR N	egligen	CE OF	THEIR S	ERVA	NTS.	
						Page	
Extent of Liability -	-	-	-	-	-	ix	
Liability to Third Parties	•	-	-	-	-	x	
If Servant act Criminally	-	-	-	-	- ·	xi, xii	
Servant must be in line of duty	-	-	-	-	-	xii, xiii	
Wilful disobedience of Servant	-	-	-	-	-	xiii	
Carelessness of Servant -	-	-	• •	-	-	xív	
Servant exceeding his orders	-	-	-	-	-	xv	
C MASTER'S LIABILITY FOR		TER I	-	o b y h is	SER	VANT.	
25							
Master's liability for neglect			. -		-	xvi	
Servant bound to take risk of a	ıll faul	tless acc	idents	incident	to na	ature xvi	
Master not free merely on acco	unt of	f some i	mnrude	nce or re	ehne		
Servant	-	-		-	-	xvii	
Servant not bound to risk his sa	fety in	cases of	immir	ent dang	er	xvii	
Some services where danger nece	ssarily	accompa	nieswi	th except	ion	xvii	
Master's duty to appoint Manag						xviii	
In Coal Mines, Master liable for							
plosion occurs -	-	-		-		xviii	
Liable for insufficiency of Scaffo	lding	and Mat	erials	-	-	xviii	
Decision in England on the po	int to	the effe	ct that	t as mas	ster	**	
appointed a properly qualifi					-	xviii, xix	
Servant's own rashness bars clai	m	-	-	-	-	xix	
When is Servant held in Master	's emp	loyment	-	· -	-	xx	
CHAPTER III. MASTER'S LIABILITY WHEN INJURY IS BY ONE SERVANT TO ANOTHER.							
MAGIERO DIADIDITI WIEN	11001	10 11	OHES	DIO VAIN I	IU A.	HOIHER.	
Former practice in Scotland for Practice in England against lia			fault o	r neglige	- nce	xxi, xxii	
in Master	-	-	-	-	•	xxiii, xxiv	

Rule applies to all workmen in a gene	aral undart	akina al	though	Page
employed by Sub-Contractors	ciai undere	aking a	inough	xxiv
A person voluntarily assisting Servant	a and injur	d be So	- -	AAII
comes under same rule -	s and mjur	ou by be	1 vants,	xxiv
Rule as fixed in Bartonshill case -		•	-	
Is there any distinction as to Superior		- nata Bar	-	xxvi, xxviii xxvii
	ana Subora	nare ber	vants	
What is Common Employment		-	-	xxviii
Lord President's opinion in Brownlie		-	-	xxix
CHAP	ER IV.			
WHEN THERE IS FA	ULT ON BO	TH SIDE	8.	
Foult on Dunance must discould contail.		_		
Fault on Pursuer must directly contribu	ite to injury	•	-	xxxi
Slight faults disregarded		-	-	xxxii
Unfenced Pits and duty on Proprietor		-	-	xxxii
Parties Trespassing		-	-	xxxiii
Fault held to exclude			-	xxxiii
When held not to bar		_ :	-	xxxiv
When faults on both sides is there divi-	sion of loss.	Lord	Justice	
Clerk Inglis' opinion	·	-	•	.xxxiv
When consequences of Pursuer's fault	might by or	dinary	care be	
avoided		-	-	xxxv
Passengers injured have claims against	Proprietor	of vehicl	e caus-	
ing injury		_	-	xxxvi
67		_		782671
	TER V.			ARAVI
СНАР		A NUTE SO	4 % MO	
CHAP		ANT SO	AS TO C	
CHAP THE RELATIONSHIP OF MASTER RESPON	AND SERV	ANT SO	AS TO C	REATE
CHAP THE RELATIONSHIP OF MASTER RESPON	AND SERV SIBILITY. yment -	-	AS TO C	REATE XXXVIII
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligence	AND SERV SIBILITY. yment - ce of Coach	-	AS TO C	REATE XXXVIII XXXIX
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligene Cases of Hackney Coaches and Post C	AND SERV SIBILITY. yment - ce of Coach haises -	- man - -	AS TO C	REATE XXXVIII XXXIX XXXIX
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligene Cases of Hackney Coaches and Post Cl Owner of Cattle not liable for Drover of	AND SERV SIBILITY. yment - ce of Coach haises - or his Serva	- man - - nt -	AS TO C	REATE XXXVIII XXXIX XXXIX XI
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligent Cases of Hackney Coaches and Post Cl Owner of Cattle not liable for Drover of Contractor not liable for workmen of a	AND SERV SIBILITY. yment ce of Coach haises or his Serva Sub-Contra	- man - - nt -	AS TO C	REATE XXXVIII XXXIX XXXIX XI XII
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligene Cases of Hackney Coaches and Post Cl Owner of Cattle not liable for Drover of Contractor not liable for workmen of a Owner not liable for Contractor's work	AND SERV SIBILITY. yment ce of Coach haises or his Serva Sub-Contra men	man - nt - actor -	AS TO C	REATE XXXVIII XXXIX XXXIX XII XIII XIII
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligene Cases of Hackney Coaches and Post Cl Owner of Cattle not liable for Drover of Contractor not liable for workmen of a Owner not liable for Contractor's work If work ordered be illegal, employer lia	AND SERV SIBILITY. yment - ce of Coach haises - or his Serva Sub-Contra men - ble for worl	man - nt - nctor - cmen -		REATE XXXVIII XXXIX XXXIX XI XII
CHAP THE RELATIONSHIP OF MASTER RESPONS Master liable for Servants in his emplother of Horses not liable for negligent Cases of Hackney Coaches and Post Cowner of Cattle not liable for Drover of Contractor not liable for workmen of a Owner not liable for Contractor's work. If work ordered be illegal, employer lia Owner of a Steamer hired for a time	AND SERV SIBILITY. yment - ee of Coach haises - or his Serva Sub-Contre men - ble for worl liable for i	man - nt - nctor - cmen -		REATE XXXVIII XXXIX XXXIX XII XIII XIIII
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligene Cases of Hackney Coaches and Post Cl Owner of Cattle not liable for Drover of Contractor not liable for workmen of a Owner not liable for Contractor's work If work ordered be illegal, employer lia	AND SERV SIBILITY. yment - ee of Coach haises - or his Serva Sub-Contre men - ble for worl liable for i	man - nt - nctor - cmen -		REATE XXXVIII XXXIX XXXIX XII XIII XIII
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligene Cases of Hackney Coaches and Post C Owner of Cattle not liable for Drover of Contractor not liable for workmen of a Owner not liable for Contractor's work If work ordered be illegal, employer lia Owner of a Steamer hired for a time by the crew, who were his servants	AND SERV SIBILITY. yment - ee of Coach haises - or his Serva Sub-Contre men - ble for worl liable for i	man - nt - nctor - cmen -		REATE XXXVIII XXXIX XXXIX XII XIII XIIII
CHAP THE RELATIONSHIP OF MASTER RESPON: Master liable for Servants in his emplo Hirer of Horses not liable for negligent Cases of Hackney Coaches and Post Cl Owner of Cattle not liable for Drover of Contractor not liable for workmen of a Owner not liable for Contractor's work If work ordered be illegal, employer lia Owner of a Steamer hired for a time by the crew, who were his servants CHAP	AND SERV SIBILITY. yment - ee of Coach haises - or his Serva Sub-Contra men - ble for worl liable for i	man nt ctor smen - njuries	- - - - - - - - - -	REATE XXXVIII XXXIX XII XIII XIIII XIIIIIIII
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligene Cases of Hackney Coaches and Post C Owner of Cattle not liable for Drover of Contractor not liable for workmen of a Owner not liable for Contractor's work If work ordered be illegal, employer lia Owner of a Steamer hired for a time by the crew, who were his servants	AND SERV SIBILITY. yment - ee of Coach haises - or his Serva Sub-Contre men - ble for worl liable for i	man - nt - nctor - cmen - njuries	- - - - - - - - - -	REATE XXXVIII XXXIX XII XIII XIIII XIIIIIIII
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligene Cases of Hackney Coaches and Post Cl Owner of Cattle not liable for Drover of Contractor not liable for workmen of a Owner not liable for Contractor's work If work ordered be illegal, employer lia Owner of a Steamer hired for a time by the crew, who were his servants CHAP OWNERS OF FIXED PROPERTY, AR WORKMEN ENG	AND SERV SIBILITY. yment - ee of Coach haises - or his Serva Sub-Contra men ble for word liable for i TER VI. E THEY LL AGED THER	man - nt - nctor - smen - njuries - ABLE FO	caused	REATE XXXVIII XXXIX XII XIII XIIII XIIIIIIII
CHAP THE RELATIONSHIP OF MASTER RESPOND Master liable for Servants in his employment of Horses not liable for negligence Cases of Hackney Coaches and Post Cleans of Contractor not liable for Workmen of a Owner not liable for Contractor's work. If work ordered be illegal, employer lia Owner of a Steamer hired for a time by the crew, who were his servants CHAP OWNERS OF FIXED PROPERTY, AR WORKMEN ENG If a clear contract with a Tradesman to liable	AND SERV SIBILITY. yment ce of Coach haises or his Serva Sub-Contre men ble for worl liable for i CER VI. E THEY LL AGED THEE do work in	man - nt - nctor - xmen - njuries - ABLE FO	caused	REATE XXXVIII XXXIX XII XIII XIIII XIIIIIIII
CHAP THE RELATIONSHIP OF MASTER RESPON Master liable for Servants in his emplo Hirer of Horses not liable for negligene Cases of Hackney Coaches and Post Cl Owner of Cattle not liable for Drover of Contractor not liable for workmen of a Owner not liable for Contractor's work If work ordered be illegal, employer lia Owner of a Steamer hired for a time by the crew, who were his servants CHAP OWNERS OF FIXED PROPERTY, AR WORKMEN ENG	AND SERV SIBILITY. yment ce of Coach haises or his Serva Sub-Contre men ble for worl liable for i CER VI. E THEY LL AGED THEE do work in	man - nt - nctor - xmen - njuries - ABLE FO	caused	REATE XXXVIII XXXIX XI XII XIII XIIII XIIII XIIII

TABLE OF CONTENTS.	vii
	Page
Lord Ivory's opinion of such liability	xlv
Early rule in England of liability	xlvi
Unless in cases of nuisance or improper use of property, the rule of	
Bush v. Steinman departed for	xlviii, xlix
No distinction in the question of liability for fixed and moveable	
property	x lix
General rule in case of Contractors for work, that during the progress owner not liable for workmen's negligence	x lix
progress owner not habte for workmen's negligence	XIIX
CHAPTER VII.	
LIABILITY ON OWNERS OF PROPERTY FOR DAMAGE DONE TO OT	HERS FROM
THE MODE OF USING, ALTERING, OR REPAIRING IT.	
Proprietor bound to keep his property so as not to injure his	
neighbour	li
Liable for undue hazards and damage to adjoining subjects by	
insufficiency of his property	li
Landlord not liable for damage to inferior property by negligence	lii
of his tenant, there being no fault on Landlord - Landlord liable if he permit nuisance on his property to injury of	111
neighbour	lii
Liable for injury caused by insufficiency of subject -	liii
Tradesman liable to his employer for damage caused by his	
unskilful and improper execution of work	liv
CHAPTER VIII.	
LIABILITY OF RAILWAY COMPANIES AND COACH PROPRIETOR	RS FOR
INJURIES TO PASSENGERS.	
Company bound to carry with reasonable care	liv
Proprietors of Stage Coaches on proving sufficiency of Coach not	
liable for its break-down	liv
Liable for sufficiency so far as human eye can discern -	liv
Responsible for negligence of Servants	liv
Railway Companies in same position	lv
Not liable for a pure accident	lv
On whom is the onus of proof Company bound to provide against accidents as far as human fore-	lvi
sight can enable them to do	lvi
Liable for inattention to "Switches"	lvii
In cases of Collision on same line onus lies on Company -	lvii
Is injured party in other cases bound to shew negligence -	lvii



Cw UN 570 H413a





the negligence or unskilfulness of a servant in his master's employ. There is an implied mandate by a master to his servant for doing all acts within his proper service. The servant, accordingly, is doing what the master, but for the delegation, would have done himself, and every act done by a servant in the course of his duty is consequently regarded as done by the master's orders, and therefore to be the same as if done by the master himself. Hence it is settled law, by numerous decisions, that the master is responsible to third parties for the fault of the servant committed within the fair scope of the employment. There is no statute qualifying the liability imposed by the common law on masters for the negligence of servants. The law in England and Scotland is founded on the principle of reason as applicable to the respective relation of the parties.

A large portion of the ordinary acts of life are attended with some risk to third parties, and no one has the right to involve others in risk without their consent, and must be liable in the consequences. This consideration is alone sufficient to justify the wisdom of the rule which makes the person by whom or by whose orders these risks are incurred, responsible to others for the consequences resulting from the fault, want of skill, or want of caution of those they employ. On this principle it has been held, that if a coachman driving his master's carriage carelessly along the road, run down a bystander, or drive a cart over a child on the highway—or a gamekeeper employed to kill game, fire so as to shoot a person passing the road; or a workman employed by a builder in building a house, negligently throw a stone so as to hurt a passer-by: in these and all such cases the person injured can treat the careless act as that of the master, and he will be responsible.² He is considered, and justly so, as bound to guarantee third parties against all hurt arising from the carelessness of himself, or of those acting under his orders—Qui facet per alium facet per se.

If a servant is driving his master in a carriage, and a person

¹ Brown v. M'Gregor, p. 10; Gunn v. Gardner, p. 21; Fraser v. Dunlop, and Anderson v. Brownlie, p. 28; Baird, p. 29; M'Laren, p. 42; Miller v. Harvie, p. 43; Niven v. Hunter, p. 48; Sword, p. 61; Dansey v. Richardson, p. 185; Gray v. Brassey, p. 164—Per. Lord Ivory.

² Per. Lord Chancellor (Cranworth) in Reid v. Bartonshill Coal Company, p. 226.

get up behind, and the servant knowing that drives carelessly and injures him, the servant may be liable, but why is the master to be responsible. 1

The case of injuries to one workman by the fault or negligence of a fellow-workman will be afterwards referred to (chap iii.)

In Scotland the liability of the master has been very strictly enforced. It would be, however, unjust to hold a master responsible for acts done by a person who may be in his service, when the acts are not within the usual line of duty of the servant, or when he has been prohibited by the master from doing them; and there are cases accordingly, shewing that in such circumstances the master would not be liable.2 "When the injury has arisen from an act which the servant was specially ordered not to do, or which being done without the master's knowledge did not lie within the line of the servant's duties, the master cannot be held bound for the consequences. Thus the proprietor of a land estate, residing at a distance from it, was held not liable in damages to the widow and children of a person who was killed by the falling of a tree growing on his estate, and which his servants were cutting down without his order, and the cutting of trees not falling within the line of the servants' duties. 8 If, again, it can be shown that the servant wilfully perpetrated the offence, or acted criminally, a distinction has been taken; and, although the servant himself would be responsible, the master would not; but if the injury should happen through the negligence merely, or unskillfulness of the servant acting in the line of his duty, the master is liable. principle may be illustrated by the case of a servant driving a carriage, if he, for some purpose of his own, wantonly strike the horses of another person and cause the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and to extricate him from a difficulty, that will be careless and negligent conduct for which the master will be liable, being an act done in pursuance of the

¹ B. Bramwell in Degg v. Midland Railway Company, 1857, p. 276.

² M'Kenzie, 1834, p. 47; Lyon, p. 54; Mitchell, 1853, p. 166; Lygo, 1854, p. 195.

³ Linwood v. Hawthorn, 1817, p. 12. Fraser, vol. ii., p. 458.

⁴ Per Lord Commissioner in M Laren v. Rae, p. 42, and in Millar, p. 43; Lord Ivory in Gray v. Brassey, p. 163-4.

servant's employment. Neither bona fides on the part of the master, nor absence from the scene of injury, free him from the responsibility. The master is not liable to punishment when the servant commits a crime, nor for the damage thereby occasioned, the servant being alone responsible. If, however, the act is done with the master's knowledge, or by his command, both will be liable.

It will not, however, necessarily relieve the master that the servant's negligence may infer criminality upon his part amounting even to culpable homicide. A more detailed reference to some of the cases may be of use in bringing out the general principles of liability. In Lord Keith v. Keir, the servants used fire in clearing the moor—this appeared to have been a common mode of doing such work—and the master was held liable for the damage caused by the incautious manner in which the servants acted.4 This decision was approved of by the late Lord President (Boyle), solely on the ground that the master had authorised the use of fire in the operation. In M'Kenzie v. M'Leod, decided in England, while the circumstances of the case occurred in Scotland. the principle was well illustrated. There one of the housemaids finding a room to smoke, told the cook that she would cure it by burning furze and straw in the chimney; the cook cautioned her against it, but she persevered, and in consequence the house was burnt down. It was proved that the custom in the district was that carpenters or masons generally cleaned the chimneys, and the housemaid had seen them doing so. C. J. Tindal, told the jury that if they thought the act of the servant, in consequence of which the accident had occurred, was done within the general scope of her duty, they should find for the plaintiff; but if it was not an act within the general scope of her duty, they were bound to find for the defendant. The jury found for the defendant; and in a motion for a new trial, the verdict was sustained. Alderson in concurring observed, "The words, 'the servant's duty,' may convey several meanings. They may mean cases where the duty is defined by precise orders, or where something is

¹ Croft v. Allison, 1821, p. 25, per Lord Glenlee in Baird, p. 30. Boucher 1 Taun., 568.

^{*} Fraser, vol. ii., p. 459-464. 1 Bank, p. 392.

Per Lord Deas in O'Bryne v. Burn, 1854, p. 202. 9 and 10 Vic. c. 93.

⁴ Dec. p. 8. ⁵ Baird, 1826, p. 30.

directed to be done, and the manner of doing it is left wholly in the discretion of the servant, or where the manner of doing it is only partly left in his discretion. In the first case the act of the servant is the act of the master—in the second the judgment exercised, may be considered the judgment of the master, and the master must be responsible. But when he has neither ordered the thing to be done, nor allowed the servant any discretion as to the mode of doing it. I cannot see how, in common justice or common sense, the master can be held responsible. To apply this principle was the business of the jury, and I think they have applied it correctly. It was neither the province of this servant to clean the chimney, nor had she received any orders on the subject, but, on the contrary, was cautioned against the course she pursued." Subsequent cases confirm this rule.1 In the various cases of coach accidents, the proprietors have been held liable for the injuries caused by the careless or unskilful driving, and the negligent acts of their servants.2 in such cases as M'Laren v. Rae, and Miller v. Harvie, the true principles are brought out. In the former, the servant had under his charge two horses and carts, and injury was caused by one of them. The chief commissioner thus stated the case to the jury, "You are to consider the situation of parties, and the point to be made out is negligence, not malevolence. It is not by the issue, whether this is a culpable act of the servant, or whether it was wilful disobedience of orders, or without or beyond his employment; but whether the servant did not do what was necessary for the protection of the public; the act of the servant, to make his master answerable for it, must be in the regular course of his duty. The fault must arise from want of skill or attention, and not from a wilful act—a criminal act will not subject the absent and innocent master."8 In Millar's case. which was for reparation for the death of a child run over by a horse and cart under the management of a servant—it embraced solatium as well as actual loss. The child had been playing on the road. The servant was drunk sitting on one of the carts The same principles were here repeated, there were, however, faults on both sides, and the verdict was for the defender. The Commissioner said-"It is established that though

¹ M'Kenzie v. M'Leod, Dec. p. 46-7.

² Dec. pp. 20-23.

³ Dec. p. 42.

the servant was drunk at the time, he was not habitually sohad he been a habitual drunkard, the master was clearly liable; but if this was accidental drinking, the master was not on that ground answerable." In the case of Baird, where damages were claimed against a master for injury done to a child through the alleged carelessness of the servant, the master was held It was there pled, that before attaching liability to a master for injuries done ex culpa of his servant, there must be some negligence or blame on the master's part, and that the carelessness and blame on the part of the child's father in allowing the child to play on the road, barred the action. "There is a great deal in the simple ground that the damage was done when no one was looking after them (the horses), nor is it a sufficient defence of the party to say, 'I hired a servant to attend to it.' The master is liable for the carelessness of the servant. It is essential, however, that the damage should arise from the way and manner of doing the master's work. For suppose a servant takes offence at another man and horsewhips him, though he at the time is conducting his master's cart, yet the damage is not inflicted in the doing of it, he is acting for himself, and the master is not liable." Lord Glenlee-"The case is distinguishable from that of Linwood, where no orders were given to cut down the tree which caused the injury, and the injury here was caused by the omission of ordinary caution in performing a duty, while Linwood's case was a mere casus fortuitus."—Lord Pitmilly ; and in the same case, the Lord Justice Clerk (Boyle), held that "the master is under a contract to the public to employ competent persons of skill and carefulness, and if he fail he will be liable." There was no evidence in the case to shew that the servant was either an unfit person to act as driver, or that he had formerly been guilty of negligence."2

In *Niven* or *Hunter*, the master was held responsible for want of proper precautions by their servant while raising a drawbridge over a canal. There was also rashness on the part of the pursuer, but in the whole circumstances the jury gave damages.⁸

In Brydon v. Stewart, a full discussion took place as to when a servant should be considered in his master's employment. The

¹ Dec. p. 43, 4.

² Dec. p. 30.

³ Dec. p. 137.

Court of Session held, in the circumstances of that case, that the servant was not doing his master's work at the time of the accident; but, on appeal, the House of Lords reversed the judgment.¹

A carrier sent his servant with goods in a cart to the city, (of London,) and on his return, a friend of the servant asked him for a drive home. The driver, in doing so, went out of his way, and ran down the plaintiff's wife, and injured her. held no liability on the master, on the ground that the servant was not engaged in his master's business; that the course of his duty did not take him where the fault was committed; and that he had no authority or permission of the master to go where he did.2 On the same principle, the Court nonsuited a plaintiff who claimed damage for injury caused by the break down of a waggon on which the plaintiff was riding. It appeared that the plaintiff had hired a waggon from the defendant to carry goods, but in the course of the journey she got up on the waggon. and it broke down, and caused her injury. The Court held, that while defendant had contracted to carry the plaintiff's goods. there was no contract to carry her person, and he was no party to her getting on the waggon.3

There are various specialties affecting the liabilities of emplovers for their servants, arising from the nature of the employment in which they are engaged—as, for instance, when they are serving public trusts or commissions. As to these, and in cases where the question is who are to be held as the real employer or master of the servants committing the injury, a short reference to the authorities will be found in another place. may here be said, on the general principle of responsibility on masters for the injuries caused by the fault of their servants. that the decisions seem to rule that it is essential that the servant be at the time acting on his master's business, under his special orders, or within the line of his ordinary duty, and that the injuries arise from the way and mode of doing the master's work, and not from any criminal act of the servant, or wilful or malicious actings, not in the proper course or mode of executing his master's employment.

Dec. p. 137.

² Mitchell v. Crasweller, p. 166.

³ Lygo. p. 175.

CHAPTER II.

LANGE FOR INJURIES SUSTAINED BY HIS SERVANT IN HIS EMPLOYMENT.

A master is liable for injuries caused by his neglect towards those whom he employs. He is not liable for unavoidable accidents, which no human prudence could have foreseen, or against which, with due care, he could not have provided. It has long been the law in England, and it may now also be held to be the haw of Scotland, that the servant, when he engages, is understood to take the risk of all faultless accidents incident to the nature of the service: more especially in work of a hazardous kind.1 Each has a duty to perform. The master is bound to furnish and keep up sufficiency of machinery and materials; to preserve same in good working order, and have skilful and competent persons for the management and conduct of the work, at least generally held and considered competent for their respective duties, and as to whose capacity for the duty the master has had no reason to distrust.² He is bound to take all reasonable care. so as to prevent any unnecessary risk to the servant in the discharge of his duty, and to provide for the servant's safety, to the best of his judgment, information, and belief.⁸ The servant has no redress against carelessness on his own part, either in the mode of his conducting the work, or in not obeying the proper rules and regulations of the establishment. He is not protected should he go out of the usual mode of working, or engage in services not included in his contract, or which may be prohibited by the master; or if he allow a known defect to continue, whereby injury may be inflicted on himself; or should the injury

¹ Scrip v. Eastern Counties Railway, p. 175; Cook v. Bell, 1857, p. 283; Hutchinson, p. 126; Paterson, p. 126; Seymour, p. 128; Priestly, p. 50.

² M'Aulay, p. 93; Whitelaw, p. 112; Ranken v. Neilson, p. 135; Gray v. Brassy, p. 56; Hill v. Caledonian Railway Co., p. 203; Tarrant v. Webb, p. 252; Lynch v. Haggart, p. 273; Cook or Haggart v. Duncan, p. 288; M'Kechnie v. Henderson and Son, p. 306; Brownlee v. M'Aulay, 1860. p. 327.

³ Priestly, Dec., p. 51; Muir v. Paterson, 1855, p. 183; O'Bryan v. Bunn, p. 200; Tarrant v. Webb, p. 254; Vose v. Lancashire and Yorkshire Railway Co., p. 298.

result from carelessness, unskilfulness, or rashness on his own part.¹

In M'Neill v. Wallace & Co., the Lord Justice-Clerk (Hope) said: "This case will then in no degree sanction the inference, that the masters are free from responsibility, merely because some imprudence and rashness have been exhibited on the part of the workmen. Quite the reverse. But here the pursuer ran into a seen danger, when his duty, even to his employer, was not to work"."

The servant is not bound to risk his safety in the service of his master where it plainly or reasonably appears that danger or injury will result: and in such circumstances, if he unduly risks himself, he will have no redress against his master for the injuries which may arise. It is not meant that every possible or probable cause of danger would justify a servant in refusing to work: every such case must be determined on its own circum-There are various kinds of service, where risks are to be run as the ordinary nature of the work, such as seamen and others: but the rule seems to be, that where, in the ordinary course of an employment, a plain, reasonable cause of danger is apparent, the servant is not bound to run the risk of personal hazard; and should he, in such circumstances, unreasonably expose himself to injury, the master will not be held responsible in reparation.3 In Alsop v. Yates, a workman was nonsuited for damages, on the ground that he continued to work in the knowledge of the erections, the defective nature of which he founded on as the cause of the injury. He had complained of the erection, but still continued to work. "I apprehend there was clearly none (evidence to go to the jury), for a very simple reason, that he himself, after he had complained, continued working there voluntarily, with full knowledge; and having done so, it seems quite idle to suppose that he can maintain an action against his master in respect of any injury occurring in this way."4 It has been decided that the master will, in the general case, be freed

¹ Alsop v. Yates, 1858, p. 296; M'Neill v. Wallace and Co., 1853, p. 168; Sutherland v. Monklands Railway Co., p. 281; Muir v. Patterson, p. 179.

² M'Neill v. Wallace and Co., ut supra.

³ M'Neill v. Wallace, ut supra; Muir or Patterson, 1853, p. 176; Priestly v. Fowler, p. 51; Lumsden v. Russell and Son, p. 238; Wigget v. Fox and Co., 1856, p. 241; Cook v. Bell, 1857, p. 283; Sutherland, ut supra.

Alsop v. Yates, p. 297.

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jured, had neglected to use them, whereby an accident happened. the master was freed from responsibility at the instance of his workmen. 1 In this case the workman also knew the particular mode in which the apparatus was worked by himself, and he continued without complaint. The carelessness or rashness of a workman has been also held to bar redress against the master, even where there has been fault in the master also: if the rashness of the servant directly contributed to the mis-"With the exercise of ordinary prudence he would have escaped the danger, and his life would have been saved. He knew the rule for testing the rope and tackling every morning, and he knew that the rule was habitually violated: for on the morning of the accident he and the other miners were told by the banksman that they had better examine the rope before they went down. Nevertheless, they disregarded this warning, immediately getting into the cage; the rope broke as they descended, and they were killed. Under the circumstances of the case, could the deceased, if he had survived, have maintained action against the defendant for what he suffered from the accident? We think that he could not, for, although the negligence of the defendant might have been an answer to the defence, that the accident was chiefly caused by the negligence of a fellowservant, the negligence of the plaintiff himself, which materially contributed to the accident would, upon well-established princiciples, have deprived him of any remedy, volenti non fit injuria -LORD CAMPBELL, C. J. 2

It is thought that, supposing the master to be able to prove the generally understood character and competency of his servant, the mere fact of the one careless act, whereby the mischief has occurred, would not be held evidence of the servant's incompetency for the duties, so as to subject the master in liability. If the contrary was to be held, then the master would in effect be held to warrant the sufficiency and to provide against all danger. This he is not bound to do. ⁸

A man is not versans in illicito if he keep a watch-dog, and he is not liable for the dog injuring a person if he has assured himself of its character. But if he knows that the dog has shown vice, and neglects to give due notice, he is liable. I am not pre-

² Tarrant v. Webb, ut supra; Gray v. Brassy, per Lord Ivory, p. 164.

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pared to hold that the master would be any more liable if the dog, instead of a stranger, were suddenly to injure one of the servants 1

The question of injuries caused to servants by the fault of their fellow-servants in the same employment, is afterwards referred to, (chap. iii.).

Many questions of difficulty may arise as to whether the servant is actually engaged in doing his master's work, at the time of the injury. In the case of Marshall, both in the Court of Session, and in the House of Lords, this question was fully gone It was a case of damage for injury done to a miner in ascending the pit. The men had gone down in the morning at the usual hour, but when at the bottom had held a meeting. conceiving themselves aggrieved, and they resolved not to work until their grievances were remedied. They appointed a deputation to wait on the master to explain their wants. In being drawn up the shaft, one of the workmen met his death, and the question was, whether he was injured in his master's service, in the meaning of the relationship between master and servant, so as to raise liability. The Court in Scotland held that he was not: but, on appeal, the House of Lords reversed the judgment. In pronouncing judgment, Lord Chancellor Cranworth explains it thus:—'I quite adopt the argument of the Solicitor General, that the master is only responsible while the servant is engaged in his employment, but then we must take a great latitude in the construction of what is being engaged in his employ. would be a monstrous proposition indeed, if, having sent a workman down into my mine to work for me, and he then choosing no longer to be employed, requires me to take him up again. that the taking up should be held to be taking him up without my being liable for the due caution for which I was liable when I let him down. That is not the meaning of the law. If, having taken him up, I afterwards dismiss him, or he remains in my employ, and means to come down to-morrow into the mine again, and in the interval he does something not in the course of his employment, the master is not by the law of Scotland, or by the law of England, responsible for it; but whatever he does in the course of his employment, according to the fair interpre-

¹ Lord Ivory in Brassy, p. 164.



tation of the words eundo morundo et redeundo, for all that the master is responsible; and it does not, in my opinion, make the slightest difference that the workmen had, according to the finding of the jury, no lawful excuse for not going on—no proper excuse for leaving their work."

CHAPTER III.

IS THE MASTER LIABLE FOR INJURIES SUSTAINED BY ONE SERVANT THROUGH THE FAULT OR NEGLIGENCE OF ANOTHER?—WHAT IS COMMON EMPLOYMENT?

Assuming the law to be, generally, that a master is liable to strangers for injuries caused by the fault or negligence of his servant, is he so liable when the sufferer is in his employment, and a fellow-workman with the party causing the mischief?

In Scotland this question has given rise to much and anxious consideration, and in practice there is as yet no very clear rule on the point. In the earliercases the special question had not been raised: but it would rather appear that this circumstance created no exception to the master's general liability. The question was referred to in the case of Sword: but that decision has been supported more properly on the ground of a continued defective system of blasting, known to the master, and thus raising his liability, by not providing for the due safety of the men, and exposing them to unnecessary risks.2 In Rankine v. Dixon the point was also raised, and Lord Justice-Clerk Hope, on a review of the authorities, ruled that there was no such distinction acknowledged in the law of Scotland. This opinion, however, does not appear to have been universally concurred in by our Judges, and in that case Lord Medwyn reserved his opinion on this point.8 In the case of Brassey it was again considered; but the case was mixed up with other circumstances, and no specific judgment on

¹ Brydon or Marshall v. Stewart, &c., 1852-5. Dec. p. 137.

² Sword v. Cameron, 1839, p. 63.

³ Rankine or Neilson, v. Dixon, p. 130-135.

the point was given. The remarks, however, of the Lord President and Lord Ivor, show that the Court did not assume it as an absolute rule that the master was in all cases liable for injury consed to a servant by the fault or negligence of a fellow-workman They appeared rather to admit an exception in the case of servand an a common employment: but that the difficulty second rather to be what was to be held as "common employ. ment," so as to affect the general liability.1 "If by repelling that ries in is meant, that if a master, in the choice of his servants or marking, is altorether free from blame, he may still be liable ther injury dame. I can only say that I am not inclined to hold that: I rather agree with the views expressed by Lord Mackensie in Smeddon v. Adie and Millar. That was a case of machiwery: and Lord Mackenzie said,—' If the master had done everything he could to ensure sufficiency, I think there would be great difficulty in holding him liable. I think there must be some however small. The principle cannot go very far, and the presumption undoubtedly is, that there was blame.' If that is sound as regards machinery—if, from some latent fault in machinery, which the master has taken every possible pains to secure against, injury happens, the master is not liable—then, as I read our law, the same principle applies in the case of servants. If the master has done everything in his power to have proper servants, skilled in their department, such as that no prudence on his part could possibly have done more to guard against irregularities in their after conduct, then I am not prepared to say he would be liable."2

In a subsequent case, however, in the Second Division, the rule was laid down, that there was no distinction in the general liability in such cases. It was so assumed in *Paterson v. Wallace*, and repeated in that of *M'Naughton*, as follows:—" I go on this broad principle, that since the employer is liable to third parties for the injuries sustained by them, he is, *d fortiori*, liable for those sustained by his own servants. The defenders say the general policy of the law is otherwise—I do not agree with that" (Justice-Clerk Hope). The general plea of non-liability for injuries caused by a fellow-workman was thus disposed of by Lord Cowan: "It is in terms the very plea urged in the case of

¹ Grav r. Brassey, p. 156.

² Lord Ivory in Grav r. Brassey, p. 163.

³ Muir or Paterson r. Wallace, Dec., p. 176; M'Naughton r. Caledonian Railway Co., p. 260-263.

Brassey, and is, in the words of Lord Fullerton in that case. "general, absolute, and unqualified." This is not the first time the point has occurred, or that the general question of a master's liability for injury done by one servant to another has been before us. It was before me as Lord Ordinary in Gray v Brassey. prior to the decision in Rankine, in this Division of the Court. It was dealt with in that case as the first attempt to introduce a principle from the law of England not hitherto recognised in the decisions of the Scotch Courts: as such I reported it to the First Division, in order that an authoritative decision might be pronounced. In the meantime Rankine v. Dixon had been decided. in which this very defence was repelled, so that there remained with me no difficulty in repelling the plea in Brassey's case; and their Lordships of the First Division adhered to the decision. His Lordship is here speaking of the general plea of non-liabilityhe reserved consideration of special cases.1

So stood the decisions in Scotland until the judgment of the House of Lords in the Bartonshill cases.

In England the general principle had been long settled, and seems to have been that a master is not in general liable for iniuries sustained in consequence of the negligence of a fellowservant acting in his master's employment, but the master would be liable if the servant, guilty of negligence, was not a person of ordinary skill and care. In Priestly v. Fowler, there being no former precedent, the Court of Exchequer, through Lord Abinger, reasoning from the general principles of the law, held that no such liability attached—that the relation of master and servant could not imply an obligation on the part of the master to take more care of the servant than he might reasonably be expected to take care of himself, although he was bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information, and belief. The servant was not bound to risk his safety in the service of the master, and might, if he thought fit, decline any service in which he might reasonably apprehend injury to himself (Laison v. Kirk-Lane's Report, p. 67), that to allow such sort of actions to prevail would be an encouragement to the servant to omit that diligence and caution which he was in duty bound to exercise in behalf of his master.2 The case of Hutchinson followed on the same principle,

¹ M'Naughton's case ut supra. ² Priestly v. Fowler, 1837, Dec., p. 50, 51

and no liability was held to attach. The circumstances were somewhat different, but the Court adhered to the general principle of Priestly. They held that there was no real distinction in the case by the fact that the negligence which caused the accident occurred on the part of the railway servants in the charge of the other train causing the collision, holding "that a servant when he engages to serve a master, undertakes as between himself and the master to run all the the ordinary risks of the service. and this includes the risk of negligence upon the part of a fellowservant, when he is acting in the discharge of his duty as servant to him who is the common master of both." In this case the Court expressed an opinion that the master would not be exempt from liability to his servant for any injury occasioned to him by the act of another servant, when the servant injured was not at the time of the injury acting in the service of his master. 1

In Wigmore v. Jay, the same decision was pronounced. injury was caused by a scaffolding giving way, and the Court held that as the defendant's foreman, who had been entrusted with the erection of the scaffold, was not alleged to have been a person deficient in skill, or an improper person to have been employed on the occasion, no liability could attach to the emplover, and that there was no fault on his part. 2 In Tarrant v. Webb, after a review of the prior authorities, the rule was confirmed: the master was freed as he did his best to employ competent servants—C. J. Jervis observing, "it is not that the master must warrant the competency of the persons whom he employs. but he must take care to select for the work persons who are competent." It would appear from the decision that the servant must prove negligence against the master before such liability can attach. In Wigget v. Fox, the rule was applied, and it was extended to all the workmen engaged in a general undertaking. notwithstanding they may be in the service or employment of sub-contractors for any departments of the work. 4 So also in Degg v. The Midland Railway Company, when a party volunteered his assistance to the railway servants in turning an engine. and was killed by the carelessness of other servants of the company, the Court held that, had he been a servant of the Company

¹ Hutchinson v. York, Newcastle, and Berwick Railway Co., 1850, p. 122-124.

² Wigmore v. Jay, p. 121.

Tarrant, v. Webb, p. 252.

⁴ Wigget v. Fox, &c., p. 241.

no liability would have lain, and, "although he was not in their employment, he having of his own accord, and unknown to them, assisted their servants, he must be held to be in the same position in the question, as if he had been a servant." In Griffiths v. Gidlaw, and in Vose v. The Lancashire and Yorkshire Railway Company, the principle was confirmed:—"I think (says C. B. Pollock), we ought to be extremely cautious how we relax the rule that was laid down in this Court originally, but which is now, undoubtedly, the law of the land, with respect to servants in a common employment suffering by the negligence of each other. I believe there never was a more useful decision, or one of greater practical and social importance in the whole history of the law. I believe it was the law—I strongly understood it to be so, before attention was called to it, for if it had not been so, we could hardly have lived in the present century without having actions brought over and over again. No such action ever had been brought before the time when it was proposed to make a master liable in respect of one servant for the negligence of I think we ought to be exceedingly cautious how we allow what, I must say I consider to be the important benefits of that decision, to be frittered away by nice distinctions, or to be broken in upon by the ingenuity of advocates, or by the verdict even of juries." In Senior v. Ward, Lord Campbell, in the Queen's Bench, held the law on the point to be settled in both countries.3

There seemed to be no good reason for any difference in the laws of England and of Scotland on this point, and the appeal in the Bartonshill cases raised the question. It was put in the House of Lords in this way:—"In the working of a mine, if one of the servants employed is killed or injured by the negligence of another servant employed in some common work, that other servant having been a competent workman, and properly employed to discharge the duties entrusted to him, whether the common employers of both are responsible to the servant who is injured, or to his representatives, for the loss occasioned by the negligence of the other?"

At the trial in Scotland, the Lord President ruled to the jury that if they were satisfied on the evidence that the injury was

¹ Degg v. Midland Railway Company, p. 275.

² Vose, 18th Jan., 1858, p. 298. Griffiths, v. Gidlaw, Dec., p. 320, 1.

² Senior v. Ward, p. 320.

SEPARATION FOR INJURIES

rement of the machinery, the defenders, his was excepted to this charge it was excepted the judges to direct the that if the jury were satisfied on the evidence and care in the duties of engineman, and that malified to perform the duties of engineman, proper machinery and all necessary means of the duties, then the defenders were not for the personal fault or negligence of Shearer the decision of the House it is presumed that the to have been sustained, and that now to this have both of England and Scotland is the same.

what has fallen from the judges in several cases it is wher there really was ever any great difference in the wuntries on this subject. The Lord Chancellor came ton a review of all the authorities. His own opinion materially differ from the views of the Lord President and in the case of Brassey, observing that, with a trifling these agreed with the law as laid down by the Court Althquer in Hutchinson—the real difficulty being what regarded as common service.2 It is, however, unmustle that the practice in Scotland had been otherwise, more rially in recent cases. The whole law on the point was very brought out in the Bartonshill cases, and the Lord Chanchelmsford), holding that the relation in which Shearer to the deceased would satisfy the strictest definition of the of parties engaged in a common employment, thus pro-to do more than refer to the different decisions upon that anbiect, in which, founded as they are on reasons which recommend themselves to the judgment, your Lordships would prohably have acquiesced. But it is said that, whatever may be the law of England, which has only recently broken in on the principle of the liability of the master for the negligence of his servants, there is no such law existing in Scotland. I own I was surprised to hear the assertion made, because I had assumed that

C ark or Reid, v. Bartonshill Coal Company, p. 225.

² Dec., p. 232.



the authorities in England had been based upon principles which were not of local application, nor peculiar to any one system of The decisions upon the subject in both countries iurisprudence. But the law cannot be considered to be so. are of recent date. The principles upon which these decisions depend must have been lying deep in each system, ready to be applied when the occasion called them forth. It will be unnecessary for me, after the complete and satisfactory manner in which my noble and learned friend has investigated the cases which have been decided in the Scotch Courts, to follow minutely in the same course. and to shew that all of them are reconcileable with the decisions in England, and that, with the exception of occasional dicta of some of the Scotch Judges, there is nothing in them to shew that there is any real difference in the law of the two countries."1

Holding, therefore, that the general principle is now at least the same in both countries, the real difficulty in such cases will come truly to turn on what is common employment, and who are to be considered as fellow-servants in the meaning of the rule. In practice, since the decision in the Bartonshill case, this point has occasioned considerable difficulty. In a very able note in M'Naughton's case. Lord Ardmillan brings out many anomalies connected with the question, having regard to the multifarious undertakings in operation in this country, and varied and distinct departments into which many large establishments Beyond what has been laid down by the decisions are divided. in both countries, much must be left to depend on the special circumstances of every case. "It may be," says Lord Ardmillan, "that the persons, though servants of the same master, stand in regard to each other in the relation of superior and subordinate. Both are indeed servants, but they are not on the same level, for superintendence is intrusted to the one, and in superintending he is doing the duty and acting as the representative of the master. In such a case the Lord Ordinary is of opinion that, for the fault of the servant having such superintendence, the master is and ought to be responsible; and in the case of Paterson v. Wallace in the House of Lords, the master's liability, where there is blame on the part of a servant charged with direction and superintendence, was recognised.2"

In the House of Lords, the decision in O'Bryne v. Burn was

¹ M'Guire v. The Bartonshill Coal Company, p. 235. ² M'Naughton, p. 262.

approved of in the special circumstances of the girl's youth and inexperience, and as she seemed to be placed under the control and perhaps protection of an overseer appointed by the master. and intrusted with this duty. The case of M'Naughton, it was stated. "may also be sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work. The deceased being a joiner or carpenter, who, at the time of the accident, was engaged in repairing a railway carriage, and the persons by whose negligence his death was occasioned were the engine-driver and the person who arranged the switches." "When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including those risks of carelessness against which their employers cannot secure them. and they must be supposed to contract with reference to such risks. I do not at all question what was said by the Lord President, that the real question in general is, what is common work? It is not necessary for this purpose that the workman causing, and the workman sustaining, the injury, should both be engaged in performing the same or similar acts. The driver and guard of a stage coach, the steersman and rower of a boat, the workman who draws the red-hot iron from the forge and those who afterwards hammer it into shape, the engineman and the signalman on a railway, are all engaged in one common work. in this case as to the engineman and the miners, they are all contributing directly to the common object of their employer in bringing the coals to the surface."8

In Stirling or Hardie v. Addie, the Court held that the relation of the deceased with the foreman or underground manager of the work did not bring it under the rule so as to form an exception to the master's liability. In the case of Lennan v. Addie, tried at the same time, and similar in its circumstances, the same judgment was pronounced by the Court of Session, but on an appeal, the House of Lords reversed the judgment. The most recent case is that of Brownlie. There the First Division held the master liable. The decision is put, however, not solely

¹ Bartonshill case, p. 23. ² M'Guire v. Bartonshill Co. p. 236-7, per Lord Chelmsford. ² Lord Cranworth, p. 232. ⁴ Dec. p 301-3

Lennan v. Addie and Miller, July 1859, Dec. p. 325.

on the ground that a master is liable for the injuries caused to his workmen through the fault or negligence of the foreman. as being distinguishable from the case of an ordinary workman. but is combined with the finding, that the master failed in his duty to the servant in not providing sufficient machinery or scaffolding for their due safety and protection. "The present case appears to me not to fall within the judgment of the Bartonshill case. In the first place, one cause of the injury was the imperfection of the machinery or scaffolding provided on the occa-I do not understand the judgment of the House of Lords to have proceeded on this—that a person who carries on works of this kind, and who is bound to provide proper machinery for his workmen, is not responsible for the consequences which may ensue from the machinery being imperfect in extent or quality. or insecure in point of construction. I further think the judgment in the Bartonshill case has not decided what the House of Lords may vet decide—that when a person who carries on a trade of such a kind that he cannot be personally present, and in which he delegates to a foreman his authority to superintend the operations and control the workmen, that the person placed in that position is a fellow-labourer." "The case might have been made to depend somewhat on this, whether the person placed in the position of a foreman, was a person of known skill, character, If the master had proved that he had engaged and prudence. an experienced workman to be his foreman, an anxious, skilful, and prudent man—it might have been said perhaps that he had then discharged his duties as far as the circumstances of the case permit, I do not know how that would be. But in this case we have no evidence on the subject. We have no evidence save one act presented to us in this case, that of ordering the men forward when he was told the scaffold was insecure, which certainly indicates great negligence on his part. If it was left to us to make any inference on the subject, I should certainly think he was not a competent person." Lord Deas, in referring to the case of Wigmore and the law of England, says-"I am satisfied that a foreman placed in the situation which this person held cannot be called a collaborateur in the sense in which that term has been used, both in this country and in England. In the case of Wigmore the distinction does not seem to have been taken be-

Lord President in Brownlie v. Macaulay, 1860, p. 327, 330.

tween the foreman and the rest of the men employed to put up the scaffold. But I cannot find any trace of its ever having been decided in England, and it certainly never was decided in Scotland, that a person employed in the circumstances of this person, is to be held a *collaborateur*, so as to free the master from the consequences of his negligence."

Such are the decisions on the point. If the general rule of the law of England be assumed, that the servant agrees to undertake all ordinary and usual risks of the service, it might be fairly contended that he had in view the different grades of workmen employed in the common service, and that he undertook the service aware of his being subject to injury, as well from accidents that cannot be guarded against, as from the neglect on the part of those who are engaged with him in the common employment, and unless there is negligence or fault shewn against the master, it would rather seem, judging from the English decisions, and the views of several of the Judges in Scotland, that in the general case he will not be liable for the injury.

CHAPTER IV.

WHEN THERE IS FAULT ON THE PART OF THE PERSON INJURED, AND ON BOTH SIDES.

Assuming that there is fault on the part of the defender, what degree of fault on the part of the person injured is sufficient to bar a claim for damages? In practice, this question has been attended with great difficulty. Every case will depend very much on its own circumstances, and it may often become a question for the jury to determine. But, having reference to the decided cases, it may be stated generally that the claim will be barred, if it is found that the fault or negligence directly contributed to the accident. Great care is necessary in libelling actions of this kind, so as to bring the statement on the record up to a relevant issue in regard to the fault, or degree of fault or negligence, attributed to the parties, and on which it is to be

¹ Brownlie, ut supra.

maintained that the fault, if any, of the pursuer has been immaterial. Under the general issue, whether injury has been sustained by the fault of the defender, it has been held to imply an allegation that the whole fault was with the defender, and consequently, that the pursuer had not only to prove injury, but also that the injury was occasioned solely by the fault of the defender.¹

Although it cannot be said that there is any fixed rule to regulate the class of cases where a party can recover, although there may be admitted fault of some kind on his part, the fault to preclude must be one directly conducing to the accident by which it was partly caused; that is to say, that the act or neglect of both parties, or the separate faults or omissions, directly contributed or concurred in, giving rise to the calamity. "I have already observed, that it is not every neglect or fault by the injured party that will prevent the recovery of damages; nor does such a result necessarily follow, even although, without the fault of the injured party, the accident would not have happened. It might be so, and yet the defenders may be responsible in damages, because the fault may, nevertheless, not be such in its character as to form a cause contributing to the injury." ²

It is not sufficient to disentitle to damages that a pursuer has been doing something which, strictly, he ought not to have done, and without which having been done the injury might not have occurred; it must not merely be remotely connected with it, for in that case it is not to be considered as contributing to the injury, and within the principle of fault sufficient to debar the recovery of damages. Such, however, may be a circumstance in assessing the amount. In the case of *Greenland*, which was an injury from a collision in the Thames, the injury was caused by the anchor of the steamer in which the plaintiff was falling on plaintiff, in consequence of the shock, whereby his leg was broken. It was stated, in defence, by the owner of the other steamer, that the anchor was improperly stowed, and further, that the plaintiff was in a place of the vessel where he ought not to have been; and but for these circumstances, the collision would not have

¹ M'Naughton v. Caledonian Railway, and in Clyde Shipping Company, p. 271-

² Lord Wood, in M'Naughton's Case. Dec. p. 270.

² M'Naughton, p. 268-9. Miller v. Harvey, p. 44. M'Neill v. Wallace, p. 168. Tuff v. Warman, p. 276.

injured the plaintiff. "I entirely concur with the rest of the Court, that the man who is guilty of a wrong, who thereby produces mischief to another, has no right to say, 'part of that mischief would not have arisen if you had not been yourself guilty of some negligence;' and I think that, when the negligence did not in any degree contribute to the immediate cause of the accident, negligence ought not to be set up as an answer to the action."—C. B. POLLOCK.1

The cases of this nature which have occurred in Scotland. have been generally in connexion with persons falling into unfenced pits, and subjected to injury by slight faults on their own part, such as deviating slightly from the open or public road, and such like. This species of fault has been disregarded as immaterial to the real negligence conducing to the calamity. will be necessary, however, to examine the special circumstances of these cases: but, generally speaking, the Court held that the duty of a proprietor or tenant in a frequented place is to fence such pits and dangerous places, so as to afford protection to the public from the danger. What, however, will be a proper fence. may be a question of circumstances.2 In England, the law on this point may be found in the recent case of Hardcastle. "When an excavation is made adjoining to a public way, so that a person walking on it might, by making a false step, or being affected with sudden giddiness, or in the case of a horse or carriage, who might, by the sudden starting of the horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences: but when the excavation is made at some distance from the way. and the person falling into it would be a trespasser upon the defendant's land before he reached it the case seems to me to be different."—B. MARTIN. And again, on the question of responsibility for fences, his Lordship, expressing the opinion of the Court, says: "When a man dedicates a way to the public, there does not seem any just grounds, in reason and good sense, that he should restrict himself in the use of his land adjoining to any extent, further than that he should not make the use of

¹ Greenland v. Chaplin, Dec. p. 119-20.

² Innes, p. 1. Black v. Caddell, p. 6. Chapman v. Parlane, p. 29. Allan and Simpson v. Mack, p. 45. Aitken, p. 50. Fraser v. Dunlop, p. 28. Hislop v. Durham, p. 77.

the way dangerous to the persons who are upon it, and using it. To do so would be derogating from his grant, but he gives no liberty or licence to the persons using the way to trespass upon his land; and if, in so doing, they come to misfortune, we think they must bear it, and the owner of the land is not responsible. If fences are to be put up, it would seem more reasonable they should be put up by those who use the way, or those who are under the obligation to repair it, than by the person who dedicates it to the public."

In the late case of *Balfour*, in the Court of Session, two boys had been near a canal basin where there was no public thoroughfare, and one of them having wandered along the banks, and among some piles of wood there stored, and was killed by the falling of the wood, the Court assoilzied the owners of the wood, in respect the boy had no right to be there. The same principle had previously been declared in *Davidson* v. *The Monklands Railway Company*, where a child three years old had been drowned in the lade near the Forth and Clyde Canal, and although there was no fence along the canal at the spot, it had been in the same state when the child's parents came to reside in the neighbourhood; and in respect, also, of there being no thoroughfare, the defenders were assoilzied.²

In Paterson v. Wallace, Lord Justice-Clerk Hope, in withdrawing the case from the jury, being of opinion that the facts proved at the trial were sufficient to show such fault on the pursuer as to preclude him from recovery, said: "We have had occasion to lay down the doctrine, that mere rashness on the part of the workman in trusting too long to the existing state of things, will not exclude a claim for reparation, if the employer has neglected his duty in not timeously providing for the safety of the men. But then the facts here, if my view of them is correct, raise a very different question, and bring in the fault of the man injured as the true cause of the injury." In the House of Lords, it was considered to be a question of evidence, and that the judge ought not to have taken the case from the jury; but on the merits as to the evidence that the fault of the pursuer truly contributed to the injury, the Lord Chancellor agreed in

¹ Hardcastle v. South Yorkshire Railway Co. 1859, p. 321.

² Balfour v. Baird, &c. Dec. 1857, p. 289. Davidson v. Monklands Railway Co., p. 217.

the conclusion arrived at by the Lord Justice-Clerk, but a new trial was ordered. In the case of *Niven* or *Hunter*, a claim for injury sustained at crossing a drawbridge on the Union Canal at Edinburgh, there seemed to have been a degree of carelessness or fault on both parties; but the Lord President (Hope) left it to the jury thus: "It is now for you to say if there was in any way fault or negligence in the management of the bridge by Cuninghame. I think he was to blame, yet, at the same time, I certainly think the woman was in fault also, though no doubt allowance must be made for the agitation and confusion into which she was thrown. In these circumstances, you must consider if this is a case for damages; and if so, what is to be the amount." The jury gave £500.1

In M'Neill v. Wallace & Co. (p. 170), there was a failure on the part of the masters to have props at the pit-mouth, but the Court held that the fault was only, in the circumstances, a secondary one, and only justifying the men to decline to work in the pits; and as they did go on with work without the props, and sustained injury, no claim for recompense lay against the master.

In cases where injury is inflicted upon one person only, but occasioned through the joint fault of both, is the whole loss to fall upon one side? In M'Naughton's case this question was necessarily raised, but the Court held that it was not pleadable under the special issue as there adjusted. The observations of the judges, it seems, had been rather misunderstood; and accordingly, in a subsequent case, the Lord Justice-Clerk, in the course of his remarks, referred to the subject, and said: "Now the case which I said could not be raised under the issue in M'Naughton's case, was not a division of loss, as in a collision of ships, but that which the pursuer did suggest in argumentviz., that any loss sustained by the defenders should be deducted from the loss sustained by the pursuer, and that the pursuer should be entitled to the balance. I certainly did not intend to give any countenance to such a claim in law, but I said that such a claim, (and not a claim for a division of loss.) if it could be maintained in law, must be raised under a different issue."2

In Greenland v. Chaplin, C. B. Pollock says: "I am not

¹ Niven or Hunter v. Edinburgh and Glasgow Canal Co., 1836, p. 48. See also Miller v. Road Trustees, p. 44. Miller v. Harvie, p. 43.

² Clyde Shipping Co., June 1859, p. 271, per. Lord Justice Clerk Inglis.

aware that, according to any decision that has ever occurred, the jury are to take the consequences, and decide them in proportion according to the negligence of the one or of the other party." 1

In England it has also been held, that damages cannot be recovered in respect of an injury to the person, when the fault of the party injured had directly contributed to the result.2 There is also a class of cases to the effect, that where the party injured by the negligence of another has himself been at fault, if remotely connected with the occurrence, may nevertheless recover damages, if, by the exercise of due and reasonable care, the defendant might have avoided the consequences of the plaintiff's negligence. In Davis v. Mann, the plaintiff had fettered the fore-feet of an ass, and turned it on the highway to graze on the road-side. The defendant's servants in charge of a waggon, in passing, killed the ass. It appeared that the horses were going at a smart pace, and the driver a little behind. The defence there was that the plaintiff was in fault in fettering the animal in a public highway, and but for that the accident would not have happened. The Court gave damages. "The defendant might, with proper care, have avoided injuring the animal, and did not; he is therefore liable for the consequences of his negligence. though the animal may have been improperly there."-LORD ABINGER. In concurring in the judgment, B. Parke said: "Were this not so, a man might justify the driving over goods left on the public road, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." 8

In Rigby v. Hewit, where a passenger on an omnibus sustained injury being thrown off by a collison with another omnibus, it appeared that the vehicles were being driven at a furious rate, and while the defendant's omnibus was endeavouring to avoid a cart in the way, it came in contact with the omnibus on which the plaintiff was seated, and threw him to the ground. Both vehicles were driven improperly, and whereby in a measure the accident was caused. The Judge ruled that such circumstance was no bar to recovery by the plaintiff, and this direction was confirmed by the Court.⁴

¹ Dec. p. 120. ² Senior v. Ward, p. 321. Waite, p. 311. Tuff, p. 276. ³ Davis v. Mann, p. 83. ⁴ Rigby v. Hewit, p. 120.

In Bridge v. The Grand Junction Railway Co. the defence was, that the collision was occasioned by the carelessness of the servants of the company, in whose carriage the plaintiff was travelling, and but for that, with the plaintiff's own negligence, the collision would not have occurred. The plea was held bad—"It is consistent with all the facts stated in it, that the plaintiff (or they under whose guidance he was) was guilty of negligence, and the defendants also, and yet the plaintiff is entitled to recover. Can it be said that, because a carriage is on the wrong side of the road, a party is excused who drives against It ought to have been shewn that there was negligence in not avoiding the consequences of the defendant's fault. The principle is clearly stated by Lord Ellenborough and J. Bayley in Butterfield v. Forrester, and that rule is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided, then he is the author of his own wrong." B. Parke.1

In Waite the defendants were assoilzied, in respect of negligence in the plaintiffs, or those in whose charge the child was. in carelessly crossing the rails when a train was approaching there appeared also to be fault on the defendants' servants. "The jury must be taken to have found that the grandmother of the plaintiff, in whose care he was when the accident happened. was guilty of negligence, without which the accident would not have happened; and that notwithstanding the negligence of the defendants, if she had acted on this occasion with ordinary care and prudence, neither she herself nor the infant would have suffered." Lord Campbell*—In the recent case of Senior in Queen's Bench, this doctrine was strongly illustrated. There was serious fault on the part of the defendant, but the deceased workman was also in fault in disregarding the rule at the work, and having himself directly contributed to the accident, no claim for damages was sustained.4

Besides the cases quoted, the case of Clayards is to the

¹ Bridge v. The Grand Junction Railway Co., p. 52. Tuff v. Warman, p. 277.

³ Waite v. North Eastern Railway Co., p. 313.

⁴ Senior v. Ward, 1859, p. 320.

same effect, where commissioners of sewers had opened a dangerous track in the outlet to a meuse, and a cabman while attempting to lead a horse out, the animal fell in, and was killed. The question was raised, whether there was rashness in the plaintiff so as to preclude him from recovering. The jury found for the plaintiff, and a rule for a new trial was discharged. JUSTICE PATTESON observing, "The whole question was, whether the danger was so obvious that the plaintiff could not in common prudence make the attempt." Again in Tuff, "If the defendant was not negligent, or if the plaintiff directly contributed to the accident, you should find for the defendant, and if the defendant directly caused the accident, you should find for the plaintiff." JUSTICE WYLES; and on a motion for a new trial, the Court approved of the direction, "The question is, the accident having occurred by the negligence of the defendants, whether the plaintiff's negligence has contributed directly to the mischief?" C. J. COCKBURN.

On the law of fault as it at present stands on the decided cases, the rule seems to be the same in both countries; and having regard to the special rule in such cases as Tuff v. Warman; and Dowell 26 L. J. (Q. B., p. 59), the law may be taken generally to be as stated by the Lord Justice Clerk Inglisin the case of M'Naughton, subsequently confirmed by the Court of Queen's Bench in Senior v. Ward in 1859—"I arrive then, without any serious difficulty in principle, at the conclusion, that when an event is brought about directly by the culpa of two persons, whether joint or several, where the culpa of each has contributed to produce the event, and the event would not have been produced but for the culpa of both, there can be no claim as between these persons for reparation of injury flowing from that event."

² Tuff v. Warman, p. 277.

M'Naughton, p. 247.



¹ Clayards v. Dethick, 4 Q. B. 449.

CHAPTER V.

THE RELATIONSHIP OF MASTER AND SERVANT SO AS TO CREATE LIABILITY ON EMPLOYERS.

A master is held bound to see that his servants are acting properly, and is consequently liable to the public for their fault and negligence while in his employment. In many cases, however, the difficulty has arisen who is to be held the master or employer, so as to be liable for the fault of the workman.

It is held that there is no relationship between a proprietor and a contractor as of master and servant in this sense, and that the principle of liability of one for the acts of another must rest on the implied mandate and authority created in the contract of service.¹

The question of the liability of proprietors of heritable subjects for damage done in connection with the property will be afterwards referred to.²

This question of master and servant has undergone much discussion in England, and in the case of Laugher v. Pointer, the principles of such liability were fully considered. The question there was, whose servant was the coachman by whose negligence the injury was occasioned. The defendant, keeping his own carriage, hired of a stable-keeper a pair of horses for the day. The stable-keeper sent the horses, and a person to drive them. The driver had no wages from his master, but depended on receiving a gratuity for his day's work. Chief Justice Abbot directed a non-suit on the ground that the driver was not the servant of the defendant. The case was subsequently argued before the Judges, and as they differed in opinion, the rule was discharged. It was contended on the one side that the driver was not the defendant's servant; if he had he would have been entitled to demand his wages. If the relation of master and servant existed in the case, why should it not be also between the hirer of post-horses for a stage and the driver, or between the hirer of a hackney coach and the coach-When horses are let for the day the owner is liable for accidents produced by the misconduct of the driver.

¹ Chap. vi., and authorities there quoted.

² Chap. vii.

would be said there is a difference between hiring for a stage or for a day, that is between a hiring for a space or for time, but if the ground of liability be that the master has the power to choose his servant that cannot make any difference. On the other hand. it was said, that the coachman was the servant of the defendant. and if that was not so, still the injury having arisen through an act done for the benefit of the defendant, he would be liable according to Bush v. Steinman. The case was distinguishable from that of a hired post-chaise or hackney-coach. was paid by the owner of the horses to the coachman. defendant might have ordered the coachman to drive wherever he pleased. Prior authorities were consistent with the defendant's liability, as they merely show that the owner of horses was liable, not that the hirer is not also liable for injury sustained in consequence of misconduct in the driver. The Court being equally divided in opinion, the point was not decided.1

In the case of Quarman v. Burnett, the question again occurred with some specialties, such as the defendant having had the coachman who generally drove them measured for a suit of livery. and they allowed him two shillings every drive. The driver in this case had stated wages from the job-mistress. At the time the damage was occasioned, the driver had gone into the defendant's house to put off the hat, leaving the horses and carriage on the road uncared for, when the horses ran off and injured the plaintiff's carriage standing on the road side. The Judge at the trial thought that there was evidence to go to the jury, and on a motion to enter a non-suit, the Court gave judgment for the defendant. The judges held that the specialties did not interfere with the decision of the general principle. "The master is liable for the acts of his servant, and that person is undoubtedly liable who stood in the relation of master to the wrong-doer. But the liability by virtue of the principle of master and servant must cease when the relation itself ceases to exist, and no other person than the master of such servant can be liable on the simple ground that the servant is the servant of another, and his act the act of another, consequently a third person entering into a contract with the master, which does not raise the relation of master and servant, is not thereby rendered liable." "Not merely would

¹ Laugher v. Pointer, 1826, p. 31.

the hirer of a post-chaise, hackney-coach. or wherry on the Thames, be liable for the acts of the owner of the vehicle, if they had the management of them, or their servants, if they were managed by servants, but the purchaser of an article at a shop which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness whilst passing along the street." 1

In Milliaan v. Wedge, in the Queen's Bench, the same rule was confirmed. There the defendant had purchased a bullock at Smithfield, and employed a licensed drover to take it to his slaughter-house in the city. The drover entrusted this duty to a boy, and in driving the bullock along with several others belonging to different individuals, the bullock did damage to the plaintiff. The case of Quarman was held to be well decided. Lord Denman expressing doubts whether there was any distinction in the law in regard to the cases of fixed and of moveable property referred to by Justice Littledale in the case of Laugher. Justice Williams put the case in this way:—"The difficulty always is to say whose servant the person is that does the injury. When you decide that the question is solved. To say that the party is liable from whom the act ultimately originates is indeed a rule of great generality, and one which will solve the greater number of questions, but its applicability fails in one case. when the person who does the injury exercises an independent employment, the party employing him is clearly not liable. agree in the decision of Randelson v. Murray, for the warehouseman's servant, whether daily or weekly, is equally under the control of the warehouseman, and that is the way in which Mr. Justice Storev puts this point; he brings it to the question who employed the person that did the niury?"

In the case of Randelson v. Murray, the defendants were occupiers of a bonded warehouse in Liverpool, and for the purpose of removing some barrels of flour from their warehouse, they employed Wharton, a master porter, who used his own tackle, and brought and paid his own men. He also employed Taylor, a master carter, to take the barrels away. Taylor sent his own carts and his own men, and one of the men was injured by a

¹ B. Parke in Quarman v. Burnett, p. 71.

² Milligan v. Wedge, Dec., p. 74.

barrel falling on him. The defendant contended that the remedy was against Wharton. The jury found for the plaintiff. The Court confirmed the verdict. "It seems to me to make no difference whether the persons whose negligence occasions the injury, be servants of the defendants, paid by daily wages, or be brought to the warehouse by a person employed by the defendant. The latter frequently occurs in a large place like Liverpool, where many persons exercise the occupation of a master porter. But the law is the same in each case." 1

Rapson v. Cubbit, is also a clear authority on this question. There a builder contracted with the owners of a club-house to execute some repairs; these included some alterations in the gas-fittings, and the contractor employed a gasfitter to execute this department of the work. By carelessness of some of the gasfitters' men an explosion took place, injuring the plaintiffs, who sued for damages against the contractor. The Court sustained the defence of non-liability-Lord Abinger observing:-"I think the true principle of law, consistent with common sense, was laid down in the case of Quarman v. Burnett, in which all the previous cases on the subject were cited and considered, and some distinguished and some overruled. I have always been of the same opinion, and see no reason for departing from that decision." B. Parke said that Quarman's case had been approved of by the Court of Queen's Bench, in Milliagn v. Wedge, and Lord Denman there said—"In Randelson v. Murray, the work to be done was necessary work done on the premises; the owners would have been liable if he had used his own servants and his own tackle: by hiring a porter and his tackle for a day he could not exempt himself from that liability." 2

In the case of *Readie* and *Hobbit*, the question was again fully discussed. A person passing under a viaduct, erected over a turnpike road, was killed by a stone falling on him from the works in course of being constructed, and action was raised against the railway company for compensation. The company had let out the construction of the railway to a contractor, whose workmen caused the injury complained of. Liability was maintained, on the principle that the known owner of fixed property was liable for an injury done in the progress of the work going on for his benefit on that property. Whether the person causing

¹ Per J. Littledale in Randelson v. Murray, Dec., p. 53.

² Rapson v. Cubbit, p. 76.

the accident was his servant or not, as it must be presumed that the owner of the property, in such a case, has the control over all persons working on his premises; and the cases of Bush v. Steinman, and Randelson v. Murray, were quoted. The defendants maintained that the true principle of all the cases is, that he who sustains an injury must proceed against the party who committed it, or those who employ him, and the question in the latter case is, was the party who did the act the servant of the party causing the injury, and that there was no distinction in this respect between fixed and moveable property, except, perhaps, in the former case, where the act complained of is a continuing nuisance. The Court nonsuited the plaintiff, holding the law as settled by the prior decisions. "Our attention was directed during the argument to the provisions of the contract. whereby the defendants had the power of insisting on the removal of careless or incompetent workmen; and so it was contended they must be responsible for their non-removal: but this power of removal does not seem to us to vary the case. workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal, if they thought him careless or unskilful, did not make him their servant. In Quarman, the particular driver was selected by the defendants, but this was held not to affect the liability of the driver's master, or to create any responsibility on the defendants; and the same principle applies here."1

In Knight v. Fox, &c., the same decision was pronounced. There a railway company had contracted with Brassey to complete certain works on their line. Brassey sublet part of his contract to the defendants. The defendants entered into a distinct contract with Cochrane to supply scaffolding for a bridge for a specific sum—the defendants finding the rest of the materials, and also the lights to warn passengers. During the construction one of the poles of the scaffolding projected on the pavement, while there was only one light placed at night to guide passengers. Owing to the defective light, the plaintiff stumbled over the projecting pole and broke his leg. The Court directed a nonsuit, holding that in the management of the erection of the scaffolding

¹J. B. Rolfe in Readie and Hobbit v. London and North-Western Railway Company, p. 107-9.

Cochrane was not the defendant's servant. The case of *Overton* v. *Freeman*, followed on similar grounds. ¹

The lessee of a ferry hired a steamer for the day with a crew to carry his passengers across. A passenger paying his fare to the lessee being injured by the negligence of the crew, it was held that the owner of the steamer was liable, the crew being his servants.²

If the work ordered to be done be illegal, the party employing the contractor is held responsible for any damage or injury which may be sustained by any one through the operation. The law on this branch may be stated in the words of Lord Campbell, in the case of Ellis:—"The proposition is quite untenable, that where there is a contractor employed to do the work, the person who employs the contractor can in no case be liable for damage arising from the performance of the work. It seems to me that if the contractor does what he is ordered to do, the act of the employed is the act of the employer. I approve of the decisions in Knight v. Fox, Peachy v. Rowland, and Overton v. Freeman, because in these cases nothing was ordered to be done but what the employer had a right to order to be done; and there being a contract to do what was lawful, the employer was properly held not to be liable for what was done negligently in relation to the The relation of master and servant does not in such contract. cases exist. But in the present case, the employer had employed the contractor to do an illegal act, which was the cause of the damage that arose, and the very ground of the present action, The defendants had no right to lay open the streets of Sheffield to put down their pipes, and the accident arose from the stones being taken up according to their orders. This is a case where a person is employed to do what is unlawful, and of loss arising from doing that illegal act. There is, therefore, both damnum and injuria, and the defendants having employed the contractor to do the act are liable for the loss." 4

¹ Knight v. Fox, &c., Dec., p. 127; Overton v. Freeman, p. 128.

² Dalzell v. Tyree, .15th June, 1858, Dec., p. 313.

³ Ellis v. Sheffield Gas Co., 1853, p. 173.

⁴ Per Lord Campbell in Ellis v. Sheffield Gas Co., p. 170.

CHAPTER VI

IS THE OWNER OF FIXED PROPERTY LIABLE FOR INJURIES DONE BY WORKMEN ENGAGED THEREON WHEN THE WORK IS DONE BY CONTRACTORS?

Generally speaking, it may be held as settled, that no liability will attach to the proprietor for injuries caused to third parties. by the fault or negligence of contractors, or of their workmen. If he has contracted with competent tradesmen to erect a house. or to build a ship, or any other subject not in the ordinary course of his own trade, the contractor whose workmen, while in the course of executing the work, may have committed the wrong. will be responsible. There must be a clear contract, however, for the execution of the work, and in any such contract it is to be presumed that the proprietor contracted for its being done in a lawful manner; and unless it can be shown that the owner was cognizant of and a party to the improper or wrongous proceedings which may have caused the injury, or that the contract was to do what was unlawful, and what the employer had no right to order to be done, he will not be responsible. such cases it is held that there is no relationship between a proprietor and a contractor, as of master and servant, in this sense, and that the principle of liability of one for the acts of another must rest on the implied mandate and authority created in the contract of service.

The question of liability of the owner of property for damage done to neighbouring properties, arising from the insufficiency of the subject, or from the mode of using, repairing, or altering it, is afterwards referred to, Chap. vii.

The difficulty more frequently arises as to what is to be held the character of contractor, in the sense to exclude liability for the wrongous act of the workmen employed in the undertaking, and on this point the decisions have varied.¹

In the case of *Nisbett* v. *Dixon and Co.*, it was found that the tenant of an ironstone pit was liable for injury done to a coal mine immediately above the ironstone, caused by the negligence

¹ Nisbett v. Dixon and Co., p. 145; Rankin v. Dixon, p. 152; Swift v. Christie, p. 143; Randelson v. Murray, p. 53.

of a sub-contractor. Dixon and Co. being the lessees, had, in the ordinary course of their trade, contracted with two individuals to take out the ironstone at so much per ton. The workwas to be constantly and fairly carried on, agreeably to the orders of Dixon and Co. or their overseers, and the men to be employed were to conform to the rules regulating the other workmen in the employment of Dixon and Co. In the course of the operations a fire occurred in the coal seam, by the carelessness of the sub-contractors, and the Court held Dixon and Colliable. The rule seems to be, that the contract must be to exercise a separate and independent trade or calling apart from the employer, and not a mere sub-contract to carry on his trade or business, and thereby be for his behoof, and doing what he himself intended to do. Lord Ivory thus clearly puts the point: "The cases which have hitherto occurred were cases of employment of tradesmen within their proper calling, such as a mason, a plasterer, or gas-fitter, employed in work which the individuals employing them are not expected to do for themselves. These things are in their nature separate and distinct; but here the case is different. The injury is suffered by something done in the course of the defenders' exercise of their own It was a matter strictly within the defenders' own call-They called in a subordinate party to perform a subordinate operation within their own trade. The party so called in belonged to the defenders' trade, and was subject to the defenders' The work was to be done on their own premises. and all in execution of their own trade and work. That view comes out with greater effect, from the position in which the parties stand in reference to the contract of lease. The contract refers to a certain field of ironstone. They bind themselves to perform certain duties, which are entirely their own. They cannot delegate or transfer these duties. They may, no doubt, employ subordinates, but they cannot transfer their responsibilities to them.2

The case of Swift v. Christie followed on the same principle.³
In Bush v. Steinman, the owner of a house had employed a surveyor to do some work on it; there were several sub-contracts,

¹ Nisbett v. Dixon and Co., ut supra.

² Per Lord Ivory in Nisbett v. Dixon and Co., p. 161; see also Rankin v. Dixon and Co., p. 152.

³ Swift v. Christie (1854), p. 193.

and one of the workmen of the person last employed laid down some lime on the road, in consequence of which a carriage was overturned. It was held that the owner of the house was liable. though the person who had occasioned the injury was not his immediate servant. So also in Sly v. Edgely, a person who had employed a bricklayer to make a sewer, who left it open, whereby a person fell in and broke his leg, was made liable, on the principle that he had employed the bricklayer, and was answerable for what had been done.2 The Judges, in subsequent cases, seemed to have doubted the rule so laid down, and were desirous of showing some specialty in the circumstances rather than to admit the general principle. Littledale, J., in Laugher v. Pointer. thus refers to the case: "But supposing the cases to be rightly decided, there is this material distinction, that there the injury was done upon or near, and in respect of the property of the defendants, of which they were in possession at the time; and the rule of law may be, that in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants. or by contractors or their servants. The injuries done upon lands or buildings are of the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any act of persons whom he brings upon the premises. The use of the premises is confined by law to himself, and he should take care not to bring persons there who do any mischief to others." stated that Lord Chief Justice Evre, who decided Stein's case. had expressed doubts of its soundness, and found difficulty in stating the precise principle on which the action was founded.

The cases of Littledale v. Lord Lonsdale and Leslie v. Pounds, where liability was held, were referred to by the Judges as having been decided in special circumstances. The former related to the working of a colliery, and was decided on somewhat similar principles as the case of Nisbet, as explained by Lord Ivory. His Lordship had a foreman or steward, paid by him, and he engaged all the under workmen, who were paid by the defendant's funds; and in the latter case the tenant of the house was bound to repair it, but the landlord superintended the repairs,

¹ Bush v. Steinman, Dec. p. 3.

² Sly v. Edgely, 6 Esp. 6, referred to in Laugher v. Pointer, Dec. p. 33.

² Laugher v. Pointer, p. 33.

and had put up some temporary boards as a protection to the public, but they proved insufficient, and he was held liable for an accident; but the case was decided on the ground of his personal interference about his own property.¹

In Laugher v. Pointer the case of Bush v. Steinman was referred to as doubtful, and only supportable in the supposed specialty in reference to fixed property.

In the case of M'Lean v. Russell, Macnes & Co., the point was The decision in Bush v. Steinman came under review. and the Court considering the authority of that case to be greatly impaired by subsequent decisions, held, upon a review of the English cases, that liability in the circumstances could only attach to the sub-contractor whose servant did the wrongous act whereby the damage was caused. Russell, M'Nee & Co. had employed a contractor to make alterations on a tenement: the contractors in their turn sub-contracted with other master tradesmen to execute certain departments of the work. One of the workmen of Tait the plasterer had carelessly left a heap of lime on the outside of the wooden enclosure erected in front of the building, and whereby the pursuer at night in driving along the street had been injured. It was contended on the authority of the English decisions, that not only the proprietors of the subjects. but also the principal contractors were responsible. Lord Fullerton said, "the question put to the jury was whether the accident in question occurred through the fault or negligence of the defenders separately. It is clear the jury held that the person immediately wrong was liable in damages, for they find Tait liable, but then they reserve the question, whether the others are responsible for The question therefore is just whether the mid contractor and employer are to be held liable for wrong done by the subcontractor. Now it is to be observed, that there was nothing hazardous in what was done. That is a different case. was nothing of that here, the repairs of this house were not attended with any hazard. There was no attempt to question the general character of Tait, or of the principal contractor as persons qualified for the work they had to do, and of good character. The question, as I said, therefore just comes to be, whether the proprietor is liable for the contractor, and for the sub-contractor,

¹ Littledale v. Lord Lonsdale, 2 H. Bl. 299; Leslie v. Pounds, 4 Taun., referred to in Laugher v. Pounds, Dec. p. 33.

whether he is called on to warrant the whole operation; now I do not think there is any principle for extending the liability so far. The case of servants is different.¹

In Quarman v. Burnett.—B. Parke, delivering the judgment of the Court against liability on the hirer of the horses, thus refers to the preceding cases:—"It is true that there are cases, for instance that of Bush v. Steinman, Sly v. Edgly, and others, and perhaps amongst these may be classed the recent case of Randelson v. Murray, in which the occupiers of land or buildings have been held responsible for the acts of others than their servants done upon, or near, or in respect of their property. But these cases are well distinguished by my brother Littledale in his very able judgment in Laugher v. Pointer. The rule of law may be, that when a man is in possession of fixed property, he must take care that his property is so used or managed that other persons are not injured, and that whether his property be managed by his own immediate servants, or by contractors with them or their servants. Such injuries are of the nature of nuisances, but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to personal moveable chattels which, in the ordinary conduct of the affairs of life, are entrusted to the care and management of others who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods for any persons who choose to entrust them."2

In Milligan v. Wedge, Lord Denman said, "I think we are bound by the late decision in Quarman v. Burnett, which was pronounced after full consideration. It may be another question, whether I should agree in all the remarks delivered from the Bench in that case. If I felt any doubt it would be whether the distinction as to the law in the case of fixed and of moveable property can be relied on."

Rapson v. Cubbit in the Court of Exchequer the same decision was come to, and the plaintiff non-suited. "The plaintiff has his remedy against Bland, whose negligence was the cause of the injury. If he attempts to go further, and to fix on the defendant, it can only be on the ground of Bland being the servant of the

¹ Richmond or M'Lean v. Russell M'Nee & Co. p. 115-119.

² Quarman v. Burnett, p. B. Parke, p. 73.

Lord Denman in Milligan v. Wedge. Dec., p. 74.

defendant, but then the obvious answer is, that Bland was only a sub-contractor to do a certain portion of the work, and that the relation of master and servant did not subsist between him and the defendant. The true rule on this subject was laid down by this Court in the case of *Quarman* v. *Burnett* which is directly in point."

The question was fully argued in the subsequent cases of Reedie and Hobbit, and the supposed difference in liability as regarded fixed a ndmoveable property disregarded. In these cases the Company had contracted with third parties to construct the Railway, and an injury was sustained by a passer through carelessness on the part of workmen of the contractor. The plaintiff was non-suited. The whole prior authorities were considered. and the law was held as settled in conformity with the case of Quarman, and others referred to. "To show that it was not, it was argued by the counsel for the plaintiff that there is a recognised distinction on this subject between injuries arising from the careless or unskilful management of an animal, or other personal chattel, and an injury resulting from the negligent management of fixed real property. In the latter case it was contended that the owner is responsible for all injuries to passers by, or others, howsoever they may have been occasioned, and here it was said the defendants were at the time of the accident the owners of the Railway, and so are the parties responsible.

"This distinction as to fixed real property is adverted to by Mr. Justice Littledale in his very able judgment in Laugher v. Pointer, and it is also noticed in the judgment of the Court in Quarman v. Burnett. But in neither of these cases was it necessary to decide whether such a distinction did, or did not exist. The case of Bush v. Steinman was strongly pressed in argument in support of the liability of the defendants, both in Laugher v. Pointer and Quarman v. Burnett, and as the circumstances of these two cases were such as not to make it necessary to overrule Bush v. Steinman if any distinction in point of law did exist in cases like the present between fixed property and ordinary moveable chattels, it was right to notice the point. But on full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act com-

¹ Rapson v. Cubbit, per B. Parke, p. 77.

plained of is such as to amount to a nuisance, and in fact, that, according to the modern decisions, *Bush* v. *Steinman* must be taken not to be law, or at all events, that it cannot be supported on the ground on which the judgment of the Court proceeded."

The subsequent cases confirm the same principle, that when a contractor is emyloyed to do a piece of work, lawful in itself, and in the ordinary course of an independent calling, the employer is not responsible for what is done negligently in course of the contract, and that the relation of master and servant, does not in such cases exist.²

The law on the point may now be held to be the same in both "Several authorities, both Scotch and English, have been referred to. From the latter it would seem that at one time in England, the proprietor or principal party was not relieved from liability or reparation of damage arising from imperfect erection, or negligent acts in its progress, even when carried on by a contractor employed by him. But the tendency of recent decisions, if not the rule fixed by them, has been, in certain cases, to attach responsibility to the employer alone. principle was, to some extent, recognised here, in the case of Russell, M'Nee, and Co., which, however, was peculiar in its cir-Still, in all the cases cited, of work done upon the cumstances. property of the principal in which the principal has been relieved from liability, the fact of there being a regular contract, written or verbal, for the performance of the work, appears to have been substantiated; and also that the work was one of some continuance, and that the injury done, for which damage was claimed, was caused by the wrongous act of the contractor during the progress of the work, and while as yet the subject, so far as the work was concerned, may be said to have been in the possession of the contractor and his servants in order to its being carried on and completed, and under his independent control.8

¹ B. Rolfe in pronouncing judgment in Reedie and Hobitt v. London and North Western Railway Company, (1849.) Dec., p. 107-111.

² Peachy v. Rowland, p. 166. Ellis v. Sheffield Gas Co., p. 173. Overton Freeman, p. 128.

³ Lord Wood in Cleghorn, v. Taylor, p. 248.

CHAPTER VII

THE LIABILITY OF OWNERS OF PROPERTY FOR DAMAGE DONE TO OTHERS, FROM THE MODE OF USING, REPAIRING OR ALTERING IT.

The general rule is, that a proprietor is bound to keep his property in such a condition that it shall not be the cause of injury to his neighbour. Liability will attach to an owner where operations on his property unduly interfere with or cause injury to the neighbouring subjects—or when he orders works of any undue hazard to his neighbours or others, or when his property may, from insufficiency, cause damage, and it is not necessary to support such claim to show that the owner wilfully caused, or knowingly allowed his property to be put, or to remain in an insecure state. But, although liable to those sustaining the damage he may have his relief against those who may have caused such insufficiency if it is not the result of tear and wear from exposure to wind and weather.

In Weston v. Incorporation of Tailors of Potterrow, liability was attempted against the proprietor of a tenement in Edinburgh for damage occasioned to the tenant of the lower flat by an overflow of water caused by an improper or careless use of the watercloset. In charging the jury, Lord Meadowbank said-"I therefore lay it down in law, that if anything has been done whereby damage has been created to the possessor of the inferior tenement, through the fault or negligence of the tenant of the upper. it must be held that it was done by him acting for behoof of the proprietors of the latter, under the implied authority from them; in fact he was placed there as their representative, and it must be held that the act was done for their behoof." The jury found for pursuer, but an exception having been taken to the charge, the Court allowed the exception, and set aside the verdict. "Now to hold with reference to such a tenement, that the owner, whether he reside in Edinburgh or not, is liable for any damage arising from the acts of his tenant; and that it is of no consequence whether it is wilful and malicious, or from the negligent or unskilful use of the subject let, if the landlord is to be liable,

¹ Cleghorn v. Taylor, per Lord Justice-Clerk, p. 246. Pollock v. Wilkie, p. 257.

without taking the tenant into view, and the pursuers are not bound to look to the tenant at all. I have some difficulty in being able to discover a principle to entitle us to concur in that part of the charge. I cannot agree in thinking that this erection carries nuisance on the face of it. If it is constructed in the ordinary manner, and not so as necessarily, or in extreme probability, to occasion damage from its ordinary use, there is no farther liability on the landlord. But if by neglect, or by what does sometimes occur. viz., mischievous practices on the part of the tenant or his family, damage does occur, it is not the landlord but the tenant who is To suppose that the landlord undertakes for the faithful use of this apparatus. I can find no principle of law whatever. When we are considering the liability of the landlord, we are to look at the lease, whether the subject is let in the ordinary way. and with the ordinary circumstances. If it be a nuisance in itself, or so as it may become a nuisance, then, according to the dicta of the English law, the landlord is liable, but not when it merely becomes a nuisance from the tenant's fault. If this be the rule in England, it has been also followed here.1

In deciding the case of *Hobbit*, the Court, per B. Rolfe, said—
"It is not necessary to decide whether in any case the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some cases he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible though the acts complained of were neither his acts nor the acts of his servant. He would have violated the rule of law—"Sic utere two ut alienum non ladeas?"

We have had cases of injury to neighbouring property, as in the case of *Callender* v. *Eddington*—a party executing repairs under the employment of the defender, brought down or cracked

¹ Lord Justice-Clerk Boyle, in Weston v, Incorporation of Tailors, p. 68, 69.

² Hobbit v. London and North Western Railway Co., p. 111. Rich v. Basterfield, per Justice Cresswell, 4 C. B. 802.

the house of a neighbour. It was not pleaded that Eddington was not responsible, and there can be no doubt that he was. It was the opinion of men of skill, who were examined, that the operation might have been carried on in such a manner as to occasion no danger or damage, but as this had not been done, the defender was held liable.¹

In Cleahorn v. Taylor, damage was done to an adjoining property by a chimney-can falling from the defenders' property. Liability was maintained on the ground that the proprietor was responsible for the chimney-can being put up in an insecure The defenders pled that there having been no culpa on their part there was no liability; and that if skilled workmen were employed, the owner was not liable for injuries caused by the insufficiency of the work. The Court held the proprietor "The question of law raised on this special verdict is of the very highest importance. The property of the defenders was. in respect of the particular matter in question, in an insecure and insufficient state, and this portion of it in consequence thereof fell and injured the pursuer's property. Is the proprietor liable in damages caused by his property being in an insecure and insufficient state? On that point I entertain no doubt whatever.2 Again, "Conterminous proprietors, especially within burgh, are under certain mutual obligations and restrictions in the exercise of their property rights. To them peculiarly is the rule of law applicable, sic utere two ut alienum non laedas. They must use their property so as not to injure that of their neighbours by any nuisance, or by what is tantamount to it, being within their premises. They may not either erect insecure buildings, the fall of which may injure their neighbour, or suffer to remain on their property ruinous tenements." "The facts found by the jury do not raise any question of this sort, viz., that while the workmen of the slater were engaged in the erection of the chimney-can and iron top, their negligence or culpa caused the can or the iron top. or both, to fall and thereby damage the pursuer's property. case of that kind occurs for decision. The work here was completed and given over to, and in the presence of, the defenders and their tenant. It thenceforth formed part of the premises erected on their property. It was their chimney-can and top.

¹ Lord President in Nisbet v. Dixon & Co., p. 149.

² Lord Justice-Clerk Hope, p. 246.

"The insecure and insufficient condition caused it to fall and equally as in the fall of a ruinous tenement, the owner of the premises must make good the loss to the party injured."1 "The cases relied on by the defenders were all of them cases where injury causing damage was committed by the workmen or servants of third parties carrying on a distinct and independent employment, and with whom the owner or principal sought to be subjected in the damage suffered, had contracted to do the work. The fault or negligence of the servants of such parties, contractors, or employers carrying on a distinct business, was not held to charge with liability the principal or owner employing them. It has been (Nisbett v. Dixon and Co.) remarked that the progress of the English law had of late been in a direction more in accordance with our views, and that the last case, that of Allan v. Hayworthy, seems to come to this, that though a railway company, who had employed a contractor, might not be liable for injury done to a passer-by, they were responsible for injury to property arising from careless execution of the railway works."2

A tradesman is liable for the unskilful and improper manner in which he performs his work, and responsible for the damage to buildings thereby occasioned. In Pollock v. Wilkie, the pursuer contracted with the defender to execute some alterations on a tenement in George Street, Edinburgh, and in the course of the operations, which were proved to have been improperly and unskilfully executed, damage was done to the adjacent properties. The pursuer, on being called on to repair the injury, did so, and brought his action of relief against the tradesman with whom he contracted. The Court held the defender liable, repelling a plea that he had carried on the work under the eye of the architect or his clerk. "The defence here is not that the defender did not do wrong, but that the pursuer saw him doing wrong, and did This man was a builder, and agreed to do the not dismiss him. We cannot listen to this."8

¹ Lord Cowan in Cleghorn v. Taylor, pp. 250-1.

² Lord Cowan in Cleghorn v. Taylor, ut supra,

Lord Justice-Clerk in Pollock v. Wilkie, 17th July 1856, p. 257.

CHAPTER VIII.

LIABILITY OF RAILWAY COMPANIES AND COACH PROPRIETORS FOR INJURIES SUSTAINED BY PASSENGERS.

The obligation on a Railway Company under their contract with the passenger, is, that they are to carry with reasonable care, and the question will be, what will discharge them of that obligation.

It has been decided in the case of stage coaches, that, on the proprietor proving the sufficiency of the coach, he was entitled to absolviter from an action of damages occasioned by its breakdown. Again. in the prior case of Anderson v. Pyper, the cause of the accident being the breaking of an axle, the point was anxiously discussed. The Chief Commissioner holding it as a new point in the practice of Scotland, said, "The rule I should draw, taking the analogy of the law of England, would be that if the carriage is sound so far as the human eve can discover, the proprietors are not liable. You are to consider the state of the coach, and form your opinion whether the human eve could have discovered the defect." Again, "you are to say whether there was such appearance of defect as the eve of an artificer applied with reasonable attention could discover, and will take into consideration that the eye of an experienced person might discover defects imperceptible to others." The jury found for the defender, holding the defect to be of such a nature as not to be observable. and a new trial was refused. In the case of Gunn, also the Commissioner stated as law, "that the proprietors undertake to furnish everything necessary as to horses and carriages, and proper persons to manage them, and the proprietors are liable for the misconduct of their servants."8

The same principles may be fairly applied to the case of Railway Companies. In M'Glashan and Hood v. the Dundee and Perth Railway Company, the defence was somewhat on the grounds above indicated, that the accident was caused without any fault on their part, but by some latent and inexplicable cause which was not discernible, and which they could not obviate or control, and had no power to avert. Parties were at issue on the

¹ Lyon, 22nd June, 1838, p. 61.

^{*} Gunn v. Gardner, &c., p. 21.

² Anderson v. Pyper, p. 23.

facts, but the case was settled extra-judicially by a payment by the Company.¹

Every person on entering a train must be aware of some risk on the journey for which no human foresight can provide; and assuming that the Company had done all that human prudence could suggest, are they free from the consequences of a pure accident? The essence of liability in such circumstances is fault, and without fault on the Company or their servants no liability would arise. This is also brought out by the terms of the issues in the various cases sent to the jury, these invariably presume "fault, negligence, or want of skill of the defenders, or others for whom they are responsible." The difficulty often arises on whom is the burden of proof thrown. It has been said that a collision or break-down presumes culpa, and that the onus is on the Company to prove sufficiency, and here also there is a distinction sometimes taken, that if the pursuer is able to prove insufficiency of any kind, or negligence, that he is not bound further to prove that such insufficiency or negligence is of such a nature as to make the defenders liable. That the mere proof of negligence or insufficiency raises a prima facie case, so as to throw on the defender the duty of shewing that the insufficiency is of a nature for which they are not liable, and beyond the utmost skill and care to have discovered.

Although a Railway Company are not held to warrant the safety of passengers as of goods, yet they are bound to provide against accident as far as human foresight and regard for the safety of the passengers can enable them to do. They must trust nothing to chance. If they see or suspect any deficiency or insufficiency, they will be liable for neglect in not acting on such knowledge. If a train was exceeding its regulated speed making up lost time, or any negligence occurred on the part of the officers or servants of the Company whereby any explosion or collision took place, the Company would be liable. It has been held in reference to stage-coaches, that while a party demanding reparation must prove the cause of damage, yet when the breakdown is proved, that the presumption was that it occurred from some fault which the owners ought to have guarded against.

¹ M'Glashan and Hood v. Dundee and Perth Railway Company, p. 102-104.

² Hood, p. 107; Gunn, p. 22; Christie v. Griggs, 2 Camp. 79; Carpue v. London and Brighton Railway Company, p. 87-8.

² Lamb v. Lyon, p. 61.

In Birkett v. Whitehaven Junction Railway Co., the Company were held liable for injury to a passenger by a collision caused at a siding by inattention to the switches. The switch was self-acting, and it was proved that although there was no one in charge of it, one of the men was working close by, and for the purpose of looking after the switch, and did shortly before examine it. The Jury held the Company guilty of negligence.1 In Bird v. The Great Western Railway Company, the point occurred on whom the onus lay. The Company were assoilzied in respect it did not clearly appear what was the cause of the accident. It was there pled that the accident presumed fault on the Company, and Chief Baron Pollock observed, "That depends on the nature of the accident, as for instance, if it arose from a collision of different trains on the same line, then it may be so. otherwise: the accident was of a nature consistent with the absence of negligence;" and again, it is impossible to say that the accident itself, even if prima facie proof of negligence, was conclusive proof of it, and if not, then there was evidence on both sides: the question was for the jury, and their finding was substantially a finding for the defendant, on the ground that there was no negligence."3

In Latch v. The Rumner Railway Company, the defendants were assoilzed, it appearing that the accident was occasioned by the wilful act of a stranger, by inserting a stone under the "lever" of one of the points, and there being no evidence of negligence on the part of the Company, it being also proved that the "lever" was right a short time before the accident.

CHAPTER IX.

LIABILITY OF MAGISTRATES OF BURGHS, TRUSTEES OF TURNPIKE ROADS, HARBOUR TRUSTEES AND OTHERS, AND THE FUNDS UNDER THEIR MANAGEMENT.

In the case of *Innes* v. The Magistrates of Edinburgh, the defenders were held responsible for the injury sustained by the

- ¹ Birkett v. Whitehaven Junction Railway Company, p. 324.
- ² Bird v. The Great Western Railway Company. Dec., p. 315-6.
- 3 Latch v. The Rumner Railwav Company, p. 296.

pursuer falling into an excavation on the public street by reason of insufficient fencing. It proceeded on the ground of the duty of the magistrates to see that the streets of the city were kept in such a state as to prevent the slightest danger to passengers.¹

In Dargie v. The Magistrates of Forfar, the same point occurred. There the pursuer, while walking along the public street, fell over a large stone lying on the pavement and was in-The defence was, that no relevant statement of misfeasance, or neglect of duty on the defenders' part, had been made: and, supposing the injury complained of could be traced to their negligence, the burgh funds could not be answerable for the consequences of their delinquency. The action was directed against the Magistrates and Council, as representing the community of the burgh. The Court there distinguished between the duties imposed by law or statute on the magistrates, as administrators of the burgh, from those incumbent on the burgh as a corporation. "The question, in the present instance, seems to be. Whether the duty or obligation of maintaining the streets of a burgh belongs to the one or the other of these two classes. It is clear that there is a municipal duty somewhere, either on the burgh or on its administrators only, to have the public streets in proper order. If that duty lies solely on the magistrates, as administrators, like the conservation of the peace, or the levy of the Annuity-tax, the present action is untenable. If it lies on the burgh and its administrators, as the organs of the burgh, like the maintenance of prisons before the New Prisons Act, the present action seems to be competent. It may appear a singular result that the community and its funds should thus be liable for the unsafe state of the public streets, when a corresponding liability would not exist if the streets were under the management of a But the answer to this difficulty seems to public commission. be that there is an essential difference between a trust and a cor-A trust is not a person in the eye of the law. created for certain purposes, but the duties imposed under it are laid on the trustees, and for any failure of duty the wrong-doers can be responsible. A corporation is a legal person. It cannot. it is true, commit crimes or proper delicts, but it can undertake corporate duties; it may fail to discharge them, and the failure may be visited civilly on the party failing—that is, on the cor-

¹ Innes v. Magistrates of Edinburgh, 6th Feb., 1798, p. 1.

poration which undertook the duty, and which did not discharge it." "In the law of England, from which the principles applicable to public trusts under this head seem, in a great measure, to have been brought or revived, it does not seem impossible to hold that a corporation may have duties, and may be liable in damages for a failure to discharge them." (Lord Neaves). On the whole, the Lord Ordinary sustained the relevancy of the action, and the Court adhered. The jury subsequently awarded damages to the pursuer.

Holding that the obligation to keep the streets of the burgh free from dangerous obstructions is incumbent on the Corporation, I further think that the plea that the funds of the Corporation are not answerable for the consequences of a breach of that duty, or of failure to perform it, is not well founded. The plea is directly at variance with the judgment in the case of Innes. Nor do I think that the principle recognised in that case is at variance with any subsequent authority. The cases in which it has been held that funds raised by taxation for specific purposes—such as the making and repairing of public roads—cannot be applied in relieving the administrators of the funds, or contractors with them, from the consequences of their misconduct or negligence, appear to me to depend upon different principles. I do not see that, in the decision of these cases, the principle of the case of Innes was called in question. Whether the Corporation may have relief against any of its office-bearers, to whose fault or negligence the breach of its obligations may be attributable, is a different question.2

As to the case of road trustees, the decisions in Scotland have varied. There have been cases to the effect that the trust funds are responsible for reparation of injuries to passengers caused by obstructions on the road, or by the fault or negligence of the trustees or their officers, servants, or contractors; but since the case of *Findlater*, as reversed in the House of Lords, the practice in such cases has changed.³ In Findlater's case, after reviewing the Scotch cases on the subject, the Lord Chancellor

¹ Dargie v. Magistrates and Town Council of Forfar, March 1855, pp. 208, 212, 215. The Mayor of Lynn v. Turner, 1 Cowper's Rep., p. 86. Henley v. the Mayor and Burgesses of Lynn, Regis. 3 Moore and Payne, p. 278.

² Per Lord Curriehill in Dargie v Magistrates of Forfar, ut supra.

³ Mackay v. Waddel (1820), p. 22. M'Lachlan (1827), p. 44. Findlater v. Duncan (1838), p. 55.

said: "But when these cases are examined it does not appear that there has been any solemn decision of the Court of Session establishing the law before this case. If the decisions had been of much earlier date, and of much more weight from repeated recognitions by the Court of Session, it might be the duty of this House to correct any important error which the House might find to have led to such a course of adjudication, but in the present case the House has not any difficulty to overcome. pendently, therefore, of authority, it remains to be considered what are the merits of the case upon the statutes under which the trustees act. The Turnpike Acts do not authorise the application of the funds levied under their authority in order to compensate for damages arising from any improper act of any person whilst employed under the authority of the trustees. application of the tolls and funds would be a direct violation of the Act. unless it could be shown to be so clearly the law at the time the Act passed, as to justify the supposition that such an application had not been enumerated, because known to be incident to the execution of the trust (which his Lordship held But why should the trust funds be not to be supposed). liable? If the thing done be within the power of the Act, the party sustaining any damage from it cannot be entitled to any compensation, unless the Act itself provides it, for this reason, that upon this supposition the Act creating the damage would be lawful; and if the thing done be not within the power of the Act, either from excluding those powers, or from the manner of doing it, why should the public fund bear the burden of indemnifying the guilty party? Many cases may be supposed in which the trustees may be so far actors in the transaction creating the damage as to render them personally liable, but none in which the trust fund ought to be applied in satisfying the party injured. The practice has now been in accordance with this decision.

As regards harbour trustees and commissioners of police, the same principles apply as were ruled in the House of Lords in the case of Findlater. In *Harris* v. *Baker*, which was an action against commissioners for maintaining, watching, and lighting the streets; for injuries sustained in consequence of falling over in the dark heaps of mud collected on the roads, the pur-

¹ Lord Chancellor in Findlater v. Duncan, p. 60; Ainslie, p. 70; Gordon, p. 70.

suer was non-suited. "If, by omitting to put up lamps when it is necessary, they (the commissioners) are guilty of a breach of public duty, they may be indicted for it. But to hold that every trustee of a road is liable in damages for such an accident as this, would, I conceive, be going further than any case warrants."

In the case of the River Clude Trustees, damages were claimed by a Shipping Company, caused by the alleged improper operations of the Trustees by a partial dredging of the river, and by the omission or fault of the harbour-master, the defenders were The pursuer endeavoured to distinguish the case from assoilzied. that of Findlater, and written argument was allowed; but the Court came to the same decision: "In the present case, as in Findlater's case, the defenders act solely as Parliamentary Trustees over the estate committed to their charge. That estate is held by them, not for private interest or profit, but solely for the benefit and use of the public. It is not alleged that the defenders personally were guilty of any wrong, either in the excavation of the harbour or in the selection of the berth for the pursuers' vessel. In both cases the Trustees have power to name overseers, and the defenders appointed a harbour-master, whose general qualification for the duty is not impeached; and in this case, as well as in Findlater's, the Trustees are very strictly limited by the terms of the statute, under which they act in the appropriation of the rates received by them."--" The remedy is against the individuals who committed the wrong, and not against This seems to be the import of all the cases in English practice, which are now held to be equally applicable to our law." The Court adhered.² When an injury has been sustained at a work constructed under statutory authority, and when not caused wilfully, nor by any act necessarily causing it, but arising from the uses of the work, it has been held that negligence must be libelled.8

In the late case, Gibb v. The Trustees of the Liverpool Docks, the Court of Exchequer, on a writ of error, had the question of liability of the Trustees fully discussed. The damage was caused to a vessel entering the docks, from an accumulation of mud. The defence

¹ Lord Ellenborough in Harris v. Baker, p. 12.

² Lord Cuningham in New Clyde Shipping Co. v. River Clyde Trustees (1842) p. 79; see also Metcalf v. Hetherington, 24 L. J., Exch. p 314, Dec. p. 327.

² Whitehouse v. Birmingham Canal Co. (1857), p. 282; Metcalf v. Hetherington, p. 327.

latterly insisted on was, that the defendants, being a corporation created by statute, and deriving no emolument from or remuneration for the performance of a statutory duty, and having a discretion as to the application of the funds received by them, they could not be made liable for not choosing to exercise their discretion at any particular time in spending the funds in removing accumulations of mud. It was averred by Plaintiff that the Trustees had received sufficient funds to enable them, not only to remove the rubbish complained of, but also to perform their entire duty of maintaining, clearing, supporting, and preserving the docks, in addition to the satisfaction of all other charges, liabilities, and incumbrances in and about the same. " It may be doubted, (said Justice Coleridge, who delivered the judgment of the Court), we think, whether, coupling this averment with the allegation of the knowledge of the trustees, that the entries to the dock were dangerous. a state of facts is not shown under which they had a positive duty to perform, and not merely a discretion to exercise as to the removing of the danger. But, at all events, we think that if they had a discretion under the circumstances to let the danger continue. they ought, as soon as they knew of it, to have closed the dock to the public, and that they had no right, with the knowledge of its dangerous condition, to keep it open, and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls to them, might enter and navigate the dock." Court held, further, that the fact, whether the tolls were received for a beneficial or for a fiduciary purpose, made no difference in such circumstances as to liability for the consequence of this breach of duty. The Trustees were held responsible.1

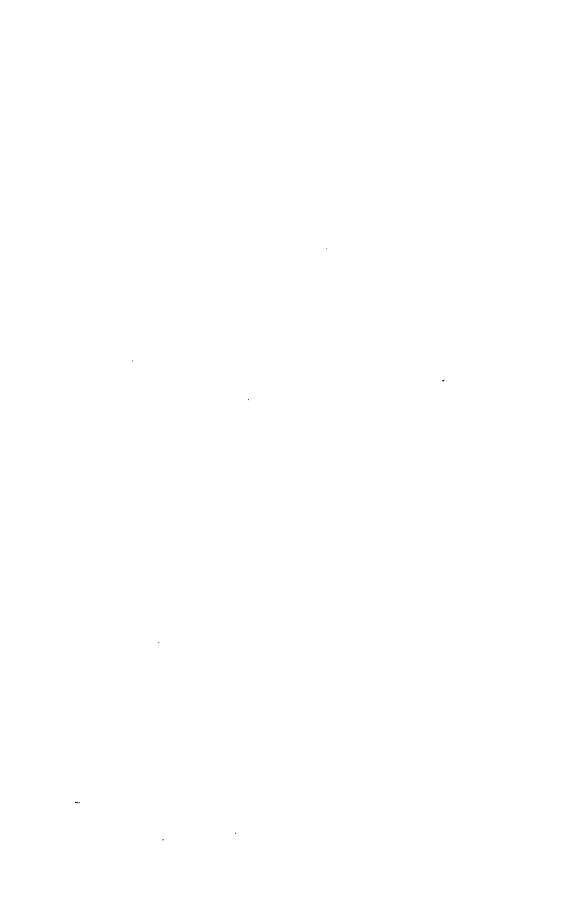
In Ruck v. Williams, which was an action against Improvement Commissioners for damage occasioned to property by the improper manner in which sewers had been constructed, and continued in an imperfect state, whereby the sewer burst and overflowed, causing damage, the defendants were found liable, the Court ultimately holding, from the authorities quoted, that it was "established, beyond all manner of doubt, that there is a liability on the Commissioners to damages, when they are enabled to

¹ Gibb v. The Trustees of the Liverpool Docks (1858), p. 308; Parnaby v. The Lancaster Canal Co., 11 Ad. and Ellis, 223; Ward v. Lee, 24 L. J., Q. B., 142; Itchen Bridge Co. v. p. 311.



reimburse themselves out of the rates for any consequences of acts done by them in the course of draining, which they are authorised by an Act of Parliament to do."—Judgment was given for the plaintiff.¹

¹ Ruck v. Williams, 6th May 1858, p. 310; Ward v. Lee, 24 L. J., Q. B. p. 142; The Itchen Bridge Co., v. The Local Board of Health of Southampton, 27 L. J., p. 128.



DIGEST

OF

DECIDED CASES.

6th February 1798.—David Innes, Pursuer, against The Innes, v. Mag. Magistrates of Edinburgh and others, Defenders.— Unfenced Pit. M. 13.189.

In rebuilding the University of Edinburgh, it was found necessary to dig a pit, about fifteen feet deep, in one of the The pit was at first watched at night, but adjacent lanes. afterwards was railed in on the east side, leaving an opening for carts getting into the pit. The opening was at first secured by a gate on hinges, and was locked by the workmen in the evening. It afterwards was found necessary. from the accumulation of earth, to change the gate to a fixed one, consisting of two fixed posts and three cross bars. These bars were in general put into the posts in the evening, and were fastened to them with nails. however, that the gate had now and then continued open during the night, and that this had arisen sometimes from the negligence of the workmen, and at other times from the bars having been afterwards removed by mischievous people.

The pursuer, who lived a few miles out of Edinburgh, had, while returning to his lodgings in Bristo Street, fallen into the pit, and got his thigh bone broken, besides being otherwise hurt and rendered incurably lame. The accident happened about 8 o'clock in a dark night. It appeared in evidence that the pursuer had during the day taken some spirits, but there was no proof of his being intoxicated. The cause of the accident was not clearly made out, but it probably arose from the cross bars of the east gate having been left out. The action was for damages on account of the injury.

INNES, v. MAG.

The Lord Ordinary found 'that the proprietors carrying OF EDIN.
Unfenced Pit, on the work which occasioned the pit being made, from 'whence the accident arose, are primarily liable in damages 'on account of any improper neglect in having the same 'railed or secured so as to prevent danger; and appointed 'the Trustees for the College, who were the proprietors in 'this case, to be called as parties.' This was done.

> The Magistrates pled, that as great precaution had been taken to prevent harm from the pit, the accident was to be considered as arising casu fortuito, and could not infer damages against any one; and if damages were incurred, the architect employed by them could alone be responsible, as the Magistrates had no concern with the erection of the building.

> The Trustees also pled non-liability on the same grounds. and that their office was gratuitous, and the funds exhausted.

> The pursuer answered—That the Magistrates, as guardians of the police, were bound to see that in every operation carried on within the burgh, sufficient precautions were taken for the safety of passengers. Any failure in this duty subjected them in damages, and if there had not been some degree of negligence in this case, the accident could not have happened.

> The Court were divided in opinion with regard to the liability of the Trustees, but subsequently assoilzied them. They were unanimous in thinking the action well founded against the Magistrates. One of their most important duties (it was observed) is to take care that the streets of the city are kept in such a state as to prevent the slightest danger to passengers. They are liable for the smallest neglect of duty, and, in this case, without some culpa on their part, the pursuer could not have met with the misfortune. Court subjected the Magistrates, but reserved their claim of relief against the representatives of the architect and others who may have acted in the carrying on of the building. Damages fixed at £285, with £100 of expenses.



22d April 1799.—Bush, &c. against Steinman.— 1 Bos. and Pul., p. 404.

Bush v. Strin-MAN. Owner of house liable for negligence of contractor's workmen.

These were two actions on the case against the defen-tractor's work-dant, for causing a quantity of lime to be placed on the men. high road, by means of which the plaintiff and his wife were overturned and hurt. *Plea*, not guilty.

The actions came for trial before Eyre, Ch. J., at the Guildhall sittings after *Hilary* term. The circumstances of the case appeared to be as follow:—The defendant having purchased a house by the roadside (but which he had never occupied), contracted with a surveyor to put it in repair for a stipulated sum; a carpenter having a contract under the surveyor to do the whole business, employed a bricklayer under him, and he again contracted for a quantity of lime with a lime-burner, by whose servant the lime in question was laid on the road. The Lord Chief Justice was of opinion that the defendant was not answerable for the injury sustained by the plaintiff under the above circumstances, but in order to save expenses, a verdict was taken for the plaintiff for £12, 12s., with liberty to the defendant to move to have a non suit entered.

A rule nisi for that purpose having been obtained, the case was argued.

EYRE, Ch. J.—At the trial I entertained great doubts with respect to the defendant's liability in this action. He appeared to be so far removed from the immediate author of the nuisance, and so far removed even from the person connected with the immediate author in the relation of master, that to allow him to be charged for the injury sustained by the plaintiff, seemed to render a circuity of action necessary. Upon the plaintiff's recovery, the defendant would be entitled to an action against the surveyor, the surveyor and each of the subcontracting parties in succession, to action against the person with whom they immediately contracted, and, last of all, the limeburner would be entitled to the common action against his own servant. I hesitated, therefore, in carrying the responsibility beyond the immediate master of the person who committed the injury, and I retained my doubts upon the subject till I had heard the argument on the part of the plaintiff, and had an opportunity of conferring with my brothers. They, including Mr. Justice Buller, are satisfied that the action will lie; and, upon reflection, I am disposed to concur with them, though I am ready to confess that I find great difficulty in stating with accuracy the grounds on which it is to be supThe relation between master and servant, as commonly

Bush v. Stein- ported.

Owner of house exemplified in actions brought against the master, is not sufficient: liable for negli- and the general proposition, that a person shall be answerable for gence of con-any injury which arises in carrying into execution that which he has employed another to do, seems to be too large and loose. The principle of Stone v. Cartwright (6, T. R. 411), with the decision of which I am well satisfied, is certainly applicable to this case; but that of Littledale v. Lord Lonsdale (2 H. Bl. 299) comes much nearer. Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference), that an injury was done to the plaintiff's house, and his Lordship was held responsible. Why? Because the injury was done in the course of his working the colliery: whether he worked it by agents, by servants or contractors, still it was his work; and though another person might have contracted with him for the management of the whole concern without his interference, yet, the work being carried on for his benefit, and on his property, all the persons employed must be considered as his agents and servants, notwithstanding any such arrangement; and he must have been responsible to all the world on the principle of sic uteri tuo ut alienum non lædas. Lord Lonsdale having empowered the contractor to appoint such persons under him as he should think fit, the persons appointed would, in contemplation of law, have been the agents and servants of Lord Lonsdale. Nor can I think that it would have made any difference if the injury complained of had arisen from his Lordship's coals having been placed by the workmen on the premises of Mr. Littledale, since it would have been impossible to distinguish such an act from the general course of business in which they were engaged, the whole of which business was carried on either by the express direction of Lord Lonsdale, or under a presumed authority The principle of this case, therefore, seems to afford a ground which may be satisfactory for the present action, though I do not say that it is exactly in point. According to the doctrine cited from Blackstone's Commentaries (I. p. 431), if one of a family "layeth or casteth" anything out of the house which constitutes a nuisance, the owner is chargeable. Suppose, then, that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a hord in the street (which being for the benefit of the public, they may lawfully do), and they carry it out so far as to encroach unreasonably on the highway, it is clear that the owner would be guilty of a nuisance; and I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of employing his own servants for the purpose; for, in contemplation of law, the erection of the hord would equally be his act. If that be established, we come Here the defendant, by a contractor, one step nearer to this case. and by agents under him, was repairing his house; the repairs were done at his expense, and the repairing was his act. If, then, the injury complained of by the plaintiff was committed in the course of making those repairs. I am unable to distinguish the case from that

of erecting the hord, or from Littledale v. Lord Lonsdale, unless, Bush v. Strinindeed, a distinction could be maintained (which, however, I do not Owner of house think possible), on the ground of the lime not having been delivered liable for neglion the defendant's premises, but only at a place close to them, with gence of cona view to being carried on to the premises and consumed there. men. Mv brother Buller recollects a case, which he would have stated more particularly had he been able to attend. It was this: a master having employed his servant to do some act, the servant, out of idleness, employed another to do it, and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable. The responsibility was thrown on the principal, from whom the authority originally moved. This determination is certainly highly conve-Where a civil injury of the nient, and beneficial to the public. kind now complained of has been sustained, the remedy ought to be obvious, and the person injured should have only to discover the owner of the house which was the occasion of the mischief: not be compelled to enter into the concerns between that owner and other persons, the inconvenience of which would be more heavily felt than any which can arise from a circuity of action. Upon the whole case, therefore, though I still feel difficulty in stating the precise principle on which the action is founded, I am satisfied with the opinion of my Brothers.

HEATH, J.—I found my opinion on this single point, viz., that all the sub-contracting parties were in the employ of the defendant. It has been strongly argued that the defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant; but no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further. Thus, a factor is not a servant, but being employed and trusted by the merchant, the latter, according to the case of Salkeld, is responsible In Rosewell v. Prior (Salk. 460), an action for the confor his acts. tinuance of a nuisance was held to lie against the defendant, though he had underlet the building which was the subject of it, and though the plaintiff had recovered against him in a former action for the erection of the nuisance: for the Court said, "he affirmed the con-"tinuance by his devisee, and received rent as a consideration for "it." That case is analogous to the present, the ground of the decision having been, that the defendant was benefited by the nuisance complained of. It is not possible to conceive a case in which more · mischief might arise than in the present, if the various sub-contracts should be held sufficient to defeat the plaintiff of this action.

ROOKE, J., concurred.—There is such a variety of sub-contracts in this case as rarely occurs, but this serves to illustrate more strongly the mischief which would ensue should we depart from the doctrine in Stone v. Cartwright. In that case, and in Littledale, the safest rule was adopted. The plaintiff may bring his action either against the person from whom the authority flows, and for whose benefit the work is carried on, or against the person by whom the injury

RUSH v. STRIN- was actually committed. If the employer suffers by the acts of those MAN.

Owner of house with whom he has contracted, he must seek his remedy against them. liable for negli-Rule discharged.

gence of contractor's workmen.

BLACK v.

CADDELL.

9th February 1804.—BLACK against CADDELL.—M. 13,905.

Injury from an unfenced pit.

Henry Black, tenant of Scotston, was returning home on horseback in a dark tempestuous evening in January 1801. He travelled by a road leading through the estate of Grange, belonging to the defender, and fell into an old coal pit near the road, and was drowned. The pit had been opened by a former proprietor, but for many years had been abandoned. There was the remains of a wall around the mouth of the pit, about eighteen inches high. The pit was about four feet from the road, which road had been used by the proprietor, when the coal was formerly worked, but it was also

The pursuers pled—In the use of property, the safety of the neighbourhood must be consulted. The owner of the land is responsible for the consequences, if from the result of operations he has made, it is possible for a man while pursuing his lawful occupation to suffer injury. Damages have been awarded to those who have suffered injury from falling into unfenced areas—(Innes, 6th Feb. 1798). Though the present proprietor be a singular successor of the person who opened the pit, he has himself used it, and it remained insufficiently fenced so as to make him responsible.

frequently used by the neighbourhood, as the field through

raised against the defender, by the children of Black, for

which it lay was unenclosed.

expenses, and for solatium.

An action of damages was

The defender maintained—If a person in the use of his property, has wilfully done anything to the prejudice of his neighbour, he would be responsible. Assythment is meant as a composition for the commission of crime. The cause of death in such cases must arise from the wilful act of the party from whom the assythment is due. There are many cases of negligence without which death could not have ensued, and yet where the person who commits the negligence, cannot be considered as the direct committer of the slaughter. These always go together to render reparation

due-whenever an assythment is due, the homicide must be such as to be the subject of criminal jurisdiction. was remote from any road by which the public had a right unfenced pit. It was fenced in a manner that the tenant whose cattle pastured there, made no complaint. In such circumstances no liability lay on the defender. If, on the other hand, the public had acquired the right to the road, the tenants were bound to have seen that the pit was secured by the defender, or have done it themselves. No complaint was ever made by them.--The Court found the defender liable in damages subsequently modified to £800.

The pit Injury from an

23d February 1809.—CHRISTIE against GRIGGS.— 2 Camp. 79.

CHRISTIK v. GRIGGS. Coach accident.

The plaintiff was a passenger on the coach to London by the Blackwall stage. The defendant was the coach proprie-The plaintiff was thrown from the coach by its breakdown, through the snapping of the axle. The defendant proved a previous examination of the axle a few days before the accident, and that the coach was carefully driven.— Verdict for defendant. Sir J. Mansfield said-Where the breaking down or overturning of a coach is proved, negligence on the part of the owner is presumed. He has always the means to rebutt this presumption if it be unfounded, and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a mere accident; again, he says: If the axle-tree was sound, as far as human eye could discern, the defendant was not liable.

8th March 1810.—DAVID SMITH, Pursuer, against John MILNE, Defender.—F. C., also 2 Dow, 290.

SMITH v. MILNE. Injury from openings wall.

The defender had been employed to plaster a house built by a Mr. Scott, and to facilitate the carriage of his materials two openings were made at his suggestion through the wall of the house from an adjoining stair-case.

SMITH v.
MILNE.
Injury from openings in a wall.

left the work in June 1802, and did not return till March or April 1803. He did not close up the openings, but other workmen continued to be employed about the house. and used the openings. In August 1802, about a month after the defender left off work, the pursuer having accidentally entered the work, through one of these openings, in the dark, fell through the floor, and had both his legs broken by the fall. He brought this action against the defender The Sheriff awarded ten guineas. for damages. vocation Lord Meadowbank adhered, but fixed the damages at £100.—The defender reclaimed and pled, that workmen were not liable at all for such accidents, but only the owner, or the overseer of the whole work,—and the Court, on considering petition and answers, altered.—The pursuer reclaimed. and the Court on 7th December 1809, returned to the interlocutor of the Lord Ordinary, on the ground that the defender ought to have fenced the openings when he left the work; and that every person concerned in the opening of the wall was liable in solidum to any person who might suffer by its not being properly fenced, but considerable doubt was entertained whether the contractor or owner might not be liable in relief; and to this interlocutor the Court finally adhered.—The decision was appealed to the House of Lords, and reversed on the ground that Milne was bound to provide against accidents only while his workmen were on the premises, that this duty, on his leaving the work, devolved on the proprietor, or the workmen next employed, and that the responsibility did not attach to the first opening of the passage, but to the subsequent neglect.

LORD KEITH v. 10th June 1812.—LORD KEITH, Pursuer, against WILLIAM Damage by fire.

KEIR, Defender.—F. C.

Mr Keir purchased the farm of Keir, on the estate of Culross. Lord Keith purchased the farm of Praybrae, which was part of the forest of Culross, and on which some wood was standing. Mr. Keir, in proceeding to improve his purchase, found it necessary to grub up a great quantity of brush and heath. He was living in Roxburghshire, and



had given positive orders to his servants, and those em-LORD KEITH v. ployed on the Keir farm, not to use fire in their improving Damage by fire.

ployed on the Keir farm, not to use fire in their improving operations; but, in opposition to these orders, his servants began to burn some of the brushwood, for the purpose of accelerating the clearing of the ground. It was alleged that every precaution was used to prevent accident from the fire; and the farm was surrounded by a stone wall of four and a half feet high. The heath round about the place where the fire was applied had been carefully removed; the day was calm, and the nearest part of the forest was distant 400 feet. At breakfast time the servants left their work, and at that time all appearance of fire had disappeared. About 10 o'clock a breeze sprung up, and shortly afterwards the wood in the forest was on fire.

Lord Keith pursued Mr. Keir for damages, on the ground that the fire was occasioned by his operations, and that he was liable for his servants.—Defence. That as the fire was used by his servants contrary to his express orders, and in his absence, he was not liable for damage thereby occasioned. After a proof had been led, the Lord Ordinary repelled the defence, and found damages due. Mr. Keir petitioned, and maintained that, even supposing that a master is liable for damage done by his servants acting contrary to express orders, still the defender ought not to be made liable here. The operation itself, and the means used to accelerate it, were perfectly innocent, and common. The servants were not versantes in illicito. Fire had been long employed for the purpose of agriculture, and its use is recognised, both in the Roman law and in ours, as a means of improvement perfectly allowable and innocent. It was used with caution. and no danger was apprehended from the appearance of the weather or otherwise; and those applying it are not responsible for damage that may be occasioned by a sudden rising of the wind, or otherwise. This was also the law of England (Raymond's Reports, p. 264, Tuberville v. Stamp). damage that the fire afterwards occasioned merely arose from a damnum fatale, which no human foresight could prevent.

Besides the common law, it was maintained that, by the 14th Geo. III., c. 78, the defender was protected from liability, that statute declaring that 'no action, suit, or process

WILL KEIR.

LORD KEITH v. whatever, shall be maintained or prosecuted against any Damage by fire. ' person, in whose house, chamber, stable, barn, or other 'building, or on whose estate any fire shall accidentally 'begin: nor shall any recompense be made by such person ' for any damage suffered thereby, any law, or usage, or cus-'tom to the contrary notwithstanding.'

The Court adhered being unanimously of opinion that the use of fire in the situation in which it was employed. was an extraordinary act of administration, and that they had no doubt that, by the servants having used it, whether prohibited or not, their master was liable for the damage that occurred

Note.—Lord Justice-Clerk BOYLE, in Baird, 4th July 1826, states that the Report of this case is inaccurate where it states that Mr. Keir gave orders to his servants not to use fire in their operations.

BROWN . M'GREGOR. Coach accident.

26th February 1813.—Mrs. Isabella Drummond or Brown and CHILDREN, Pursuer, against Alexander M'Gregor and Others, Defenders.—F. C.

Alexander Brown, perfumer in Edinburgh, being a passenger on the top of the Mercury coach to Glasgow, was killed by the overturning of the coach, in consequence of coming in contact with a post chaise, while both vehicles were driving at unusual speed.

An action was raised for reparation by the pursuers, the widow and children of the deceased, against the owners of The Lord Ordinary found the proprietors of the the coach. coach and chaise conjunctly and severally liable in damages. The defender reclaimed, maintaining that the fault of their servants was not of a description that rendered them responsible for any damages to the pursuers; but that, at all events, from Mr. Brown's exertions in business having ceased to be serviceable to his family, the damages ought to be di-The Court entertained no doubt as to the law minished. of the case. They were unanimously of opinion, that when damage was sustained by the unskilfulness, malversation, or culpable negligence of servants in matters entrusted to their care, the masters are liable. A question arose as to the amount of damage to be allowed.—Lords Meadowbank and M'GREGOR. Pitmilly thought that the loss of a husband or father was Coachaccident not to be estimated merely by the pecuniary advantages which the family derived from his exertions—he was not to be considered merely as if he had been part of the goods in his shop—a man may be a burden instead of an advantage to his family, and yet if his life be improperly taken away, the Court must give damages in solatium of the wounded feelings and affection of his relatives, which were surely of deeper importance than the tangible injury that could be sustained from the loss of emoluments derived from his exertions.

The Lord Justice-Clerk concurred, and referred to the case of *Black* v. *Caddel* (9th Feb. 1804), where this principle was given effect to, and where L800 was awarded. The Court *adhered* to the Lord Ordinary's interlocutor, awarding L200 to the widow, and L130 to each of the children.

15th April 1815.—HARRIS against BAKER.—4 Maule and Selwyn, p. 26.

HARRIS v.
BAKER.
Damage
against Road
Trustees.

The defendant was the clerk of the trustees for maintaining, watching, and lighting the Commercial Road, &c., and the plaintiff pursued for damages, in consequence of his wife having fallen over a heap of dust collected on the road sides, near the plaintiff's house; and, 2dly, having allowed a heap of earth and gravel to continue on the said highway, during the night time, without placing any light or signal at or near the heap, whereby the plaintiff's wife fell over it, and broke one of her arms.—At the trial Lord Ellenborough said, the fact seems to be, that the highway had been cleaned in the beginning of May, and in doing so, the labourers heaped the scrapings in round heaps between two and three feet high, and about two yards asunder on the sides of the road, and some stood on the side near the plaintiff's house and shop, and remained for nearly a month.

These were stated to be an annoyance to the passengers. In the evening after dark, there being no lamps by the road side, the plaintiff's wife fell over one of the heaps, and broke her arm. His Lordship was of opinion in this case, that the

HARRISA BAKER. Damage against Road Trustees.

trustees were not liable in damages, they being so far removed from the cause of it, and he directed a non suit.

A new trial was moved for: but the rule was refused-

LORD ELLENBOROUGH.—It does not appear by the Act of Parliament that this action is maintainable against the trustees. The Act indeed empowered them to cause such number of lamps to be provided as they shall think necessary; but suppose they did not think it necessary to provide any lamps, can it be said that an action would lie against them on that account. If by omitting to put up lamps, when it is necessary, they are guilty of a breach of public duty, they may be indicted for it. But to hold that every trustee of a road is liable in damages for such an accident as this, would, I conceive, be going farther than any case warrants.

LE BLANC, J., concurred—In Bush v. Steinman the lime-burner's servant who committed the nuisance from which the injury arose. was considered as being in the employment of the owner of the house. and working for his benefit, and that the owner was bound to see, that those employed by him did not cause or commit any nuisance.

Damage by falling of a tree.

LINWOOD v. 14th May 1817.—JANE LINWOOD, Pursuer, against VANS HATHORN and others. Defenders.—F. C.

> John Linwood, tenant of Freugh, while proceeding along the high road to Strangaer, was killed by the fall of a tree cut on the estate of Garthland belonging to the defender. Mr. Hathorn.

> The widow raised an action of damages against Mr. Hathorn, the proprietor of the estate, and against John Hathorn and William Reid, through whose intervention, directions, express or implied, had been given to cut down the tree; and Peter Mackie and Mathew Graham, the persons by whom the tree was actually cut down. After a proof had been led, the Lord Ordinary reported the case-Mackie and Graham did not dispute their share in the transaction, they cut down the tree at the side of the public road, during the day, while persons were going along to the public market. It appeared that William Reid had marked the tree to be cut down, and would have been present had he not been John Hathorn, had died during the otherwise engaged. dependence of the action, and no transference had been brought against his representatives. The fact that all those connected with cutting down the trees were made parties,

by preventing their evidence being got, left this branch of Linwood r. the case with imperfect proof. William Reid had been Damage by employed in such occasions as wood forester, and had marked falling of a tree. the trees intended to be cut down. After the event Mr Hathorn continued all the parties in his employment.

The pursuer maintained that the proof established that the tree was cut down by two of the defenders, within a few vards of the high road, without any warning being given to the passengers, and without any precautions being taken to prevent injury to them. The defender John Hathorn, who had a general superintendence of the proprietor's estate, sent a message to William Reid, employed on the estate, to cut down trees, though not this particular tree, and Reid marked the trees to be cut, and employed Peter Mackie and Matthew Graham to cut down the tree. though there is nothing illegal in the act of cutting down a tree on the side of a public road, it is an act which is leval or illegal according to the adoption or neglect of the necessary precautions for the public safety. Due warning is absolutely necessary to constitute the legality of an act which, in other circumstances, might have been exercised without any such precautions. This was not a case of casus fortuitus, but a highly culpable piece of carelessness imposing somewhere a liability for damages. The acquittal of Graham by the criminal Court is not a res judicata, as the absence of that positive intention to injure constituting crime, does not exclude his being chargeable with that degree of culpability in the civil sense subjecting him to reparation by damages.

A master is not liable for the crime of his servant, but he is liable for all the injurious consequences arising from neglect or carelessness in the performance of all acts in themselves perfectly lawful done in his service. This is the implied contract under which every man acts or possesses, and he cannot relieve himself from its obligations by exercising these acts of possession by delegation instead of in person.

Although Mr. Hathorn gave no precise authority for cutting down this particular tree, and even supposing it done contrary to his wishes, still if the operation was performed by the direction, or concurrence of the persons employed in

HATHORN, &c. Damage by falling of a tree.

Linwood v. the management of his property acting bona fide for his behoof, he must be responsible.

> The defender Hathorn pled-This was as strong an instance of casus fortuitus as can be imagined. There was every presumption that the tree would fall into the field. and not into the road, and the whole operation was more visible from the road than to those cutting the tree, one of whom was placed for the very purpose of giving warning. and there was no appearance of danger until the tree was precipitated into the road, by the unexpected rising of the wind: Deig. lib. ix. tit. 2, 1, 30, sect. 3. Such warning is only necessary to put passengers on their guard, whether given by the tongue, the hand, or the visible or audible obviousness of the danger itself.

> The acquittal of Graham, who was the only agent in cutting the tree, by the Justiciary Court, is conclusive as to his innocence, and must be so likewise as to the others. Assythment is not due, when, after trial, the person accused has been acquitted.—Hume's Com. vol. i., p. 448.

> The defender himself was residing at a distance, and gave no orders for cutting down the tree, on the contrary it was against his wish that it should be cut down. does not establish that John Hathorn had any general management of the proprietor's estate, and he certainly had no power to cut the wood, a power which no proprietor delegates to any one. It is not proved that any orders were given by John Hathorn to William Reid to cut the tree; and William Reid's general superintendence of the woods, to see that no damage was done to them, had ceased a year and a-half before the accident. Peter Mackie, although the defender's servant, was so for a particular purpose only, with no power to employ others; and Matthew Graham never was the defender's servant.

> The finding a master liable for the unskilful or negligent performance of an act in his service, even when particularly authorized by him, is a stretch of presumed delinquency, a good way beyond the rules of natural justice (Bankton, lib. 1, tit. 2, sect. 30). But it is a much more violent stretch of constructive obligation, to make a master responsible for the general fitness or prudence of his servant

in the discharge of any general or permanent duty, and Linwood v. liable in damages where he commits an injury for want of Damage by these qualities, whether in his master's presence or not falling of a tree. (Stair, lib. 1, tit. 9, sect. 5; Kames' Principles of Equity, lib. 1. part 1. c. 1. sect. 2. p. 63), M'Manus against Cricket, 25th November 1800, East. The exceptions, for the sake of expediency, from the general rule that culpa tenet suos auctores, are very few, as in the case of a tradesman, innkeeper, and the like, who are liable for their servants ex contractu, because the work has not been duly performed: or where a master employs a servant, knowing him to be unskilful or dishonest, or orders him to do a thing which is wrong, though lawful for the servant to do. general rule applies where no contract can be pleaded, and where no blame is imputable to the master.

Even in rude times, when the slave was the mere instrument of the master, and had no property of his own, some remedy was provided against unlimited liability, (Inst., lib. iv., tit. 8, cod. 1. iv. An serv. pro suo facto, Pand. 1. xv., Masters were afterwards found not liable. De cond. furt.). unless for servants hired for a term (Galbraith v. Anderson, 12th Jan. 1617, Kerse, M. 13,924; Murislaw v. Haliburton, 28th March 1623, Haddington, M. 13,984). And their liability afterwards ceased altogether, unless culpa could be brought home to them, or when responsibility was created by contract, (Campbell v. Barrie, 15th July 1748, Kilkerran, M. 13,987; Thorburn v. Ellis, 24th May 1811. Stair, lib. iv., tit. 9, sect. 5; Bank., lib. iv, tit. 2, sect. 30).

Informations were given in for the other defenders, pleading that the accident was altogether a casus fortuitus, and that there was no culpability in the operation of cutting the tree appearing from the proof; and reference as to the law of the case was made to the information of Mr. Vans The principal object of the pursuers was to make Hathorn. him liable.

LORD GLENLEE.—As to the fact how far Mr. Vans Hathorn had given instructions to cut this tree, I should think, from the proof, that he had not, or rather that he did not mean to cut trees at all in that place. It is equally clear that Reid was in the habit of doing business of that kind for him; but it is not necessary to go into that; for I own, as far as concerns Mr. Hathorn, I have great doubts if he

Damage by

Linwood v. would have been liable if he had given orders to cut this tree. Where HATHORN, &c. a person employs another to do an act, which in its own nature is falling of a tree, unlawful, he is answerable for what may happen in consequence— There is also a certain order of cases, there can be no doubt of that. where you cannot say that the person is versuns in illicito: but still there are certain precautions requisite to be taken to prevent injury to others, which, if neglected, will subject him in damages. It is well remarked in the papers, that there is a distinction to be observed in such cases. There are certain things which, from their universality, and the necessity of their being done, have precise rules pointed out for doing them, which every person is bound to follow; and a person neglecting them is blameable, and the employer will be answerable, though he employs rational and skilled persons to do But there is a great variety of cases of a different kind, where precautions may, no doubt, be used, but where much may depend as to the nature of the precautions, or circumstances occurring at the very time of doing the act, and where it is impracticable to give instructions beforehand as to what is to be done. All you can do is, to take care that it be done in such a way that every person employed will take the proper precautions. As in the case of a person repairing the roof of his house, or altering a building in a town, it is not an illicit act to throw the rubbish into the street, but it is necessary to have some person to warn the passengers of their danger. man employs a person to repair his house, and he actually has a proper watch to warn the people, accidents may still happen; the person warned may be thinking of something else, and not attend to No doubt, if the person giving the warning is very active, he might remedy it, but his employer could not be liable, if from some accident he did not. In general, it is perfectly impossible to think that, with any care, all accidents can be prevented: if you avoid those that are most likely to happen, and take proper precautions for others, this is all that can be required. I don't see how the common operations of life could go on otherwise, if a man could never do anything without risking his fortune from some accident that may happen.

As to the accident here, the cutting the tree near the road, and even letting it fall into the road, is not aversatio in illicito: but it was a reasonable precaution to exact, that some person should warn the passengers of the danger. I will not say how far the neglecting that would render the proprietor liable; it might be presumed that the person employed would attend to it. But, suppose that he is bound to do so, I doubt if he is liable for every accident where the precaution has been ineffectual. Suppose the accident had happened in this way—that the head of the hatchet had flown off and killed the man—this might have been very careless on the part of the woodman, as he ought to have seen that it was secure; but is his master to be liable because he should have told him to go to the smith? This is one of those things which it is unreasonable to exact; and it ought not to come against the master, but the individual guilty of the negligence. I see very well, in this case, that Graham and

Mackie acted with sufficient precaution, and I doubt if any reason-Linwood v. able person would think of more. One was employed in cutting HATHORN, &c. the tree. and the other could be there for no other purpose but to tell falling of a tree. people of their danger. I have no idea that the proprietor, in cut-Whetherowner ting a tree, so as to fall on the road, is doing a wrong act; but to be sure you are to dress it immediately, and not allow it to remain. rather suppose the high road is the proper place for its falling, and not among the other trees. It is requisite, however, to have people to warn of the danger; but passengers having been able to see the proper precautions going on, I think everything was done that it was reasonable that the proprietor should be responsible for having done; and it is hard that, for a mere accident, he should be liable in damages.

As to Reid, the case is very slender against him. As to the others. the one that was actually cutting was employed, and could do nothing else, and Mackie was the only person to blame; but a thousand accidents may have occasioned it. I am rather inclined, therefore, to consider this as a pure accident; and, upon the whole, I am for assoilzieing all the defenders.

LORD CRAIGIE.—This question appeared to me from the beginning. and it does so still, very clear against all the defenders. cutting large trees on the side of a high road must be hazardous, and great attention is necessary; if that is neglected, it will subject in damages. There are authorities to show that this was the civil law. (De lege Aquilia, Inst. iv., tit. 3, sect. 5.) In addition to this, it appears from the proof, that so far from giving notice, some of the passengers said, they ought not to go farther without giving notice. Upon the whole, it appears to me that it is against law that any one of the parties can be assoilzied. I doubt if Mr. Hathorn should be made ultimately liable, as Reid was liable, as he undertook to see the tree cut down; but there is no doubt that the whole are liable to the pursuer.

LORD BANNATYNE came to the same conclusion.

LORD JUSTICE-CLERK.—As to John Hathorn, there is no evidence that he ordered the tree to be cut. But as to Mr. Vans Hathorn, attend to the proof. It will not do where the liability is to be brought home to a proprietor to say that it must be presumed to be done by his order, because it would follow, that whatever is done either with or without his consent, he is to be liable for the consequences. This is not founded in the law of Scotland, nor in the Roman law, nor, I will venture to say, in the law of any civilized country, because if an act done in direct opposition to his orders is to subject him to an assythment, it would be establishing a doctrine requiring a long train of decisions to establish. On the case of Lord Keith, if it is correctly reported, I must say that with all the respect I have for the other Division, I hope it is allowable for me to hesitate as to the propriety of the decision, because I understand from the report, that the burning was in opposition to the orders of Mr. Keir; and yet it is said, that the Court were clear that he was responsible. I shall just say, on looking at the argument drawn from

Damage by falling of a tree.

this case, that it appears to me a very special case, and that too much HATHORN, &c. caution cannot be used in following it as a precedent. If it is meant to be laid down in general, that servants, acting in opposition to orders, are to subject their masters, I cannot accede to the doctrine; but I must own I have very much the same view as Lord Glenlee. that none of the cases quoted have the most remote connection with this case, because not only is there a defect, in not bringing home the positive orders to Mr. Hathorn, but the best reason to think that he would not have allowed a tree to be cut in that situation. in the absence of this evidence, you have the question of constructive liability as proprietor. In the first place, it is not an unlawful act to cut a tree, even on the side of the high road, if due precaution was taken, which we must presume was the case here. But none of the cases quoted touch the principle here; nor does that case of Caddell, with regard to damage from a coal pit, touch it either. A coal pit too is dangerous at all times, and particularly when it is left in a deserted state; and, at common law, the Procurator Fiscal may apply to have open pits filled up, or otherwise secured, and this was done by the late Sheriff of Linlithgow, as to all the open pits in the county. The proprietor is bound to know the danger to the public. if left in a neglected state, as in the case of Caddell; and the Court had no difficulty in finding that he was answerable for the consequences of leaving it in that situation, not only on the road, but on the edge of it. As to stage coaches and vessels, they contract for the safe conveyance of the lieges. In Brown's case it was a race between the coach and a chaise; the proprietors were found liable on that responsibility; and the liability was brought home to the owner of the chaise, as he was warned that the person was drunk, and vet he allowed him to drive. As to the case of Milne, the judgment was reversed, so it is out of the way as a precedent. It was, however, decided on the same principle, that a person struck out a dangerous opening in a house he was building, and took no precaution to prevent injury; but it was quite a different case from this. case of Innes went on the principle of the guardians of the public police being bound to prevent injury to the lieges, as it was not against the trustees for the buildings, but against the magistrates. None of these cases, with the exception of that of Lord Keith, support the present action. Mr. Hathorn states that he was ignorant of the operation, gave no authority for doing it, and could give no directions as to the precautions to be used. I have no doubt, from the humane feelings of him and every other gentleman, he would have done so if in his power; and the trees were afterwards sold by public roup, so that they were not cut for any purpose on the estate of Garthland. Taking the facts as made out against him, I do not think you can hold that he gave authority for the act. On the other hand, I do not think there was that neglect on the part of the actual operators so as to subject them. But even if there had been such neglect, at least in Reid, the question as to finding Mr. Hathorn liable is one where the liability is not supported by any authority of the law, certainly not by the law quoted by Lord Craigie, which

goes only to the persons actually employed. I do not see any autho- Linwood v. rity in our own law, or in the Roman law, and no case, with the HATHORN, &c. exception of that of Keir, which, no doubt, does apply in some de-falling of a tree. gree, but to which I have already said I do not accede. Although regretting much this accident, and the loss to the pursuer. I do not find myself entitled to sustain her action against all or any of the defenders

The Court being divided in opinion, the case was again advised.

LORD ROBERTSON said.—The pursuer has brought an action for reparation by way of damages, for a grievous loss sustained by her. In that action she has called Mr. Vans Hathorn and several others as defenders, and I am persuaded the pursuers were aware that though they have called the others, it was not from them they expected reparation. It was to Mr. Hathorn, and to him alone, that they must have looked for damages;—I cannot help thinking it was done with the view of depriving him of their evidence.

It appears to me that the principal defender is the person least Whether proper precautions might have been taken by those actually employed to prevent such an accident, I will not now inquire. As to Mr. Hathorn personally and individually, he had no concern in the unfortunate accident at all, he was living at a great distance, and knew nothing about it. But it is said that he is liable for the damages occasioned by the carelessness of those employed by No doubt there are cases, and not a few of them, in which a person is liable for the damage occasioned by the carelessness of those employed by him. This is the case of artificers, of owners of a ship, who are liable for the acts of the master and seamen, and a proprietor of a stage coach, who is answerable for the skilfulness of the But I apprehend, that in all these cases, the liability arises ex contractu, incurred in consequence of his having failed to fulfil the object which he contracted for. The owner of a stage coach undertakes to convey the passengers safely; and if he employs unskilful persons, through whose fault an accident happens, he must be liable in damages. There is no such contract in the present case. There may, no doubt, be figured other cases, where without a contract, the master may be liable for the acts of those employed. case of a person employing another to dig the foundation of an urban tenement, and where, by his unskilfulness, the gable wall of the next tenement is damaged, I apprehend he might be liable for the damage, but then there must be evidence of an actual employment of the tradesman by whose unskilfulness the accident has happened. But I find no evidence of the actual employment by Mr. Hathorn of any persons to cut down the tree. If we were to go the length to say that a proprietor of a large estate is to be liable in damages for every piece of work done by persons on his estate, without any direct command, I apprehend we would be laying the foundation for a dangerous doctrine indeed. None of the cases quoted apply, for in almost

Damage by falling of a tree.

Livernon n. all of them the damage was done ex contractu, as particularly in HATHORN, &c. the case of Brown. I am, therefore, for assoilzing the defenders.

> The Court sustained the defences, and assoilzied the defenders, and adhered to this interlocutor, on advising a petition and answers

ATTAW . M'LEISH. Damage by overturn of a stage coach.

10th July 1819.—ALLAN against M'LEISH, &c.—2 Mur., p. 158.

This was an action of damages against the proprietors of a stage coach, and the guard and driver, for injury done by the overturn of the coach. The defence was.—the overturn was an accident, for which the defenders are not answerable.

The issue sent to trial was,-Whether, on or about the 25th July 1818, the Waterloo Coach, of which the defenders are proprietors or contractors, was overturned between the North Queensferry and Inverkeithing, in consequence of the negligence or improper conduct of the coachman or guard, whereby the pursuer, then a passenger in said coach. suffered bodily harm ?—Damages claimed for medical expense, L200; for solutium, L5000.

The coach, soon after leaving the north side of the Queensferry, was proceeding with great velocity, and in turning a corner was overturned. It appeared that the coachman wished to pass a gig upon the road; and there were some witnesses called to shew that the pursuer, who was on the outside of the coach, had urged the coachman to do so. A number of the passengers were hurt, and the pursuer Jeffrey, for the defender, said this was an action against the proprietors solely for the negligence of their servants; he did not deny they were so liable, but in any view the damage ought not to be vindictive. The question is, Whether the injury has been occasioned by the culpable negligence of the driver? Proprietors are not liable for accident, and, from what he should prove, this must be held as The coach was not furiously driven, and we an accident. shall prove that the pursuer urged the coachman to drive.

FORSYTH.—The proprietors are liable for the conduct of their servants. If the pursuer urged the driver to go too fast, he ought not to have complied.

L. C. COMMISSIONER.—Held the law to be properly stated in the issue. The question is, negligence or improper conduct. The proprietors are bound to find proper persons to conduct the coach, and if they fail they are liable in damages; but it is a mere civil question of reparation, not of punishment. On the question so much argued at the bar, whether the pursuer is cut out of his redress, by his conduct in exciting the driver to push his horses, I think both sides go beyond the mark. Proprietors are bound to find persons, not only capable of conducting the coach properly, but who will not be excited to improper conduct. If the person appointed yield to the excitement, they must repair the damage. The question of damages may be materially affected by the pursuer's conduct; but I cannot say that there ought to be a verdict for the defender, as if the pursuer's conduct were a bar to the action.

ALLAN v.
M'LEISH.
Damage by
overturn of
stage coach.

It was stated in defence, that the overturn was occasioned by a stone on the road, but from the evidence I think you will be satisfied that it was occasioned by the nature of the situation, together with the quick driving, whatever was the cause of that quick driving; and considering the evidence, you must say whether the overturn was occasioned by the negligence or improper conduct of the coachman or guard; and if you are satisfied that it was, a verdict must follow for the pursuer; as I state to you, as matter of law, that the excitement by the pursuer only goes in diminution of damages, not as a bar to the action.

Verdict for the pursuer, L.200 for medical attendance, and L.1000 for damages and solatium.

28th February 1820.—Gunn against Gardiner, &c.—Mur. 2, p. 194.

GUNN v.
GARDINER.
Damage from overturn of a stage coach.

This was an action against the proprietors of a stage coach, and the guard and driver, on account of the negligence, carelessness, or improper conduct of the guard and driver.

Defence.—The coach was not overturned by any cause for which the proprietors are liable.

The issue was,—Whether the coach was overturned in consequence of the negligence, rashness, or improper conduct of the defenders, or any of them.

In the beginning of 1816 the Telegraph Coach was overturned, on the road between Edinburgh and Glasgow, near the Inn at Airdrie, by going over a heap of stones on the road. The pursuer was a passenger, and having sustained injury, pursued for damages.

The pursuer stated that he would prove negligence on

Gunn s. GARDINER. overturn of a stage coach.

the part of the driver and guard amounting to delinquency. Damage from for which the defenders were liable.

> THE LORD C. COMMISSIONER.—The law on the subject is, that proprietors undertake to furnish every thing necessary as to horses and carriages, and proper persons to manage them. The proprietors are eventually liable for the misconduct of the servant. The proprietors are not liable in the case of pure accident. The jury must therefore consider whether it is a case of pure accident, or whether it is a case of negligence or improper conduct. If the coachman was drunk. there is a clear ground of decision: but if not, there is no clear evidence of rashness. The question as to negligence may be applicable. not only to the servants, but to one, at least, of the defenders, who lived close to the place where the stones were on the road. If you think the coachman not in a fit state to conduct the coach, or that his conduct was improper, you will find for the pursuer; but if you think the coachman was fit for the situation, and that the stones ought to have been removed by others, then you will find for the defender.

Verdict for the pursuer, L.150.

MACKAY v. WADDELL Damage against Road Trustees.

29th February 1820.—MACKAY against WADDELL, and Others.—2 Mur., p. 201.

The coach proprietor (in Gunn's case) brought an action of relief against Waddell for laying down the stones on the road, and, secondly, against the Road Trustees, for improperly allowing them to remain on the road.

LORD C. COMMISSIONER.—The stones were laid on the road, and the question is, whether they were improperly laid? The custom of the country is important in this branch of the case, and custom seems to sanction what was done; but if materials are laid down, they must be laid with common care and attention, and in such a way as not to be liable to be turned out of their place by others. It was said the question was, whether the stones were the cause of the accident. but that is not the proper way of putting it. There is a great difference between the cause and a cause. There is no doubt the coach was overturned by running on the stones, and that it might have avoided them; but we have no evidence to show that the coach would have been overturned if the stones had not been there, and we must presume that it would not.

The second issue involves a most important matter of law, as it refers to all Road Trustees in the kingdom; and I should be sorry if we could not put this case in a proper shape, to have the question The question turns on the evidence, and upon your opinion, whether the Trustees allowed the stones to remain, and whether they allowed them improperly to remain?—(He referred to the evidence). I shall not decide whether Trustees are bound to know what is upon the road, but I think the law is in such a state as to make it proper for me, in this case, to submit the evidence to you; and one can hardly suppose the stones were there for a week without the Trustees knowing it. The presumption is, that they were seen by the Trustees and the Surveyor; and his seeing them, and having communication with the Trustees, is an additional circumstance.

GUNN 1 WADDE Damage against .

The jury found that the Trustees improperly allowed the stones to remain on the road for two or three weeks, that the coach, coming into contact with them, was overturned, whereby Gunn suffered severe bodily injury.

18th March 1820.—Anderson against Pyper and Co.— Anderso 2 Mur., p. 261.

Damage f the overtu a stage cos

Action of damages against the proprietors of a stage coach, and the guard and driver, by the pursuer, a passenger, hurt by an overturn.

Defence.—The overturn was occasioned by a defective axle, for which the defenders are not responsible. Issues.— 'Whether the coach was overturned in consequence of the 'negligence or improper conduct of the said coachman or 'guard driving the said coach, whereby the pursuer sus-(2.) Whether the said coach was 'tained bodily harm? 'overturned in consequence of one of the axle-trees being 'badly constructed, faulty, defective, or composed of insuf-'ficient materials? (3.) Whether the alleged faulty and 'defective construction of the said axle-tree, and the insuffi-'ciency of the materials, by which the accident is alleged to 'have happened, arose from the inattention, negligence, or 'misconduct of the said defenders, or persons acting for 'them?'

ALISON.—At common law the proprietors of a coach are liable for damage done by any defect in it, whether visible or not, as well as for negligence or improper conduct of their servants. Besides, there is a statute (50 Geo. III., c. 48) regulating the number of passengers, &c., and to prevent them sitting on the luggage.

MONCRIEFF.—Maintained, that the defenders were not liable for a latent defect; that the furious driving and overloading was disproved by the pursuer's witness; that if a passenger sat on the luggage there was no necessity for doing so, and that the plea founded the overturn of a stage coach. to this case.

ANDERSON v. on the statute was a new one, brought out now for the first time. Damage from If the coach had been top-heavy, the plea might have applied.

LORD COMMISSIONER.—The act gives its remedy, but does not apply

MONCRIEFF.—The question here is the state of the coach before the accident, and all the evidence applies to the appearance of the In England, Sir J. Mansfield held that, the iron after the accident. injury being proved the presumption was against the proprietors, (Christie v. Greggs, 2 Camp. 79). But in this country it is necessary to prove some negligence on the part of our neighbours to enable us to claim reparation—it was a damnum fatale, or absque injuria. There is no evidence that the flaw existed before the coach left We shall prove that we furnished a sufficient coach. Queensferry. and were attentive inspecting it; and there is no warranty of safe conveyance of passengers, as there is of goods.

JEFFREY.—The pursuer paid for a conveyance in a sound coach. and had been put into an unsound one. Though he did not maintain the liability of the proprietors for a pure accident, arising from some external cause, yet he held them liable if they furnished insufficient horses, carriages, &c., whether they knew it or not, in the same manner as the owners are liable if a vessel is not seaworthy. The first and second issues make it appear that the coach was weak, and that, from overloading and overdriving, the axle broke. presumption is, according to the case quoted, that this arose from negligence; and there is no law to show that general evidence is sufficient to get over this presumption. He protested against the rule of inspection being sufficient; but there is no proof of inspection here.

LORD C. COMMISSIONER.—The real question is, Whether the overturn was occasioned by the negligence of the defenders? The defenders are liable for the negligence of their servants. The act referred to can only be taken as evidence in this case of what the Legislature thought was the proper number of passengers, and as a criterion to assist you in forming an opinion on the question of overloading. There is nothing in the terms of the issue to entitle you to consider it in any other view.

So far as I know, this is the first case of the sort which has been decided in this country; and even in England there have been very I consider the case of passengers different from the carriage of goods—the fear of tricks of common carriers has led to the rule of absolute liability as to goods, but the same does not hold as to passengers. The rule I should draw, taking the analogy of the law of England, would be, that if the carriage is sound, as far as the human eye can discern, the proprietors are not liable; and this, I state to you, is the subject of inquiry in the present case. The question is, under second and third issues, whether that care, diligence, and attention, which is applicable to the subject, has been used, and whether the defenders have used the utmost care to which human foresight could reach? You are to consider the state of the coach, and to form your opinion whether the human eye could have dis-

covered the defect. It requires a clear case to be made out; and has Anderson v. the pursuer made out such a case? Has he proved insufficiency; Damage from and have the defenders proved that it could not have been discovered? the overturn of These I lay down to you as the principles on which you are to judge a stage coach. this case, not because they are the law of England, but because they are the dictates of common sense. You are to say whether there was such appearance of defect as the eve of an artificer, applied with reasonable attention, could discover; and will take into consideration, that the eye of an experienced person might discover defects imperceptible to others.

The jury returned a verdict for the defenders. A rule was applied for a new trial, but it was refused by the Court.

LORD C. COMMISSIONER.—As to the verdict being contrary to evidence, if I am right in the law, then the question of negligence is for the jury. We cannot fix how many inspections are necessary, and with what velocity the coach may run. Had a case of gross negligence been made out, the Court might have set aside the verdict. but as the flaw had only the appearance of a hair, which, on the evidence, the jury thought human skill could not discern antecedently to the cause of the injury; and as the evidence of attention on the part of the proprietors was laid before the jury, with which they were satisfied, we think that we ought not to grant a new trial.

LORD GILLIES concurred.

25th June 1821.—Croft and Another, against Alison.— Croft, &c. v. 4 Barn, and Ald., p. 590.

Damage by collision on high-way. Liability servants'

The plaintiffs were livery stable keepers, and had hired a for chariot for the day from Messrs. Lambert and Bryant, who acts? were coachmakers. The plaintiffs furnished the horses, and appointed the coachman, and then let it out to an individual for the day. The chariot was lawfully standing on the public highway, and the defendant's coach and horses. under the care of a servant, were driving along the highway. and so carelessly and improperly driven by the servant, that the wheel of the coach struck and damaged the chariot. The action was for recompense. It was stated in evidence. that the cause of the accident arose from the defendant's coachman striking the plaintiffs' horses with his whip, in consequence of which they moved forward, and the chariot was overturned. At the time he so struck the two carChow, &c. v. riages were entangled. The Lord Chief Justice left it to Albon.

Damage by col-the jury, to determine whether the carriages had become liston on high-entangled from the moving of the horses of the plaintiffs, which, previously to the accident, were standing still, and without a driver; and he directed them to find for the defendant in case they thought so, and that the whipping by the defendant's coachman was for the purpose of extricating himself from that situation. But he directed them to find for the plaintiffs, in case they were of opinion that the entangling arose originally from the fault of the defendant's

A new trial was moved for, on the ground that the plaintiffs could not be called the owners or proprietors of the chariot; and, secondly, that the injury arose from the fault of the defendant's coachman in whipping the plaintiff's horses: that was a wanton act on his part, for which he himself, and not his master, would be liable.

The jury found for the plaintiffs.

The Court held—As to the first point, it has never been supposed that a mere passenger in a carriage can be considered as the owner or proprietor, so as to be entitled to bring this action. The plaintiffs were something more, for they have not only hired the chariot for the day, but have appointed the coachman and furnished the horses. They may therefore, for the purposes of this action, be held as the owners and proprietors of the chariot. As to the second point, the distinction is this: if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce an accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment. The case, therefore, has been properly left to the jury.

Rule refused.

OGILVIE v.

MAG. OF EDIN.
Responsibility
for Leith pilots.

22d May 1821.—OGILVIE and Others, against THE MAGISTRATES OF EDINBURGH.—F. C.

A ship, having on board a pilot, ran aground on a sandbank, near the entrance of the dock at Leith harbour, and received considerable damage. The owners raised action against the underwriters, and they again claimed relief from

the defenders as representing the community of the city of OGILVIE 7. Edinburgh, proprietors of the harbour of Leith. It was main-MAG. OF EDIN tained that, as the harbour master and pilots were appointed for Leith pilots. by the defenders, they were responsible for their conduct. The Lord Ordinary found liability. The Magistrates reclaimed, maintaining that there was an essential difference between the right of a person to perform a public duty, or to exercise a profession, and choosing a servant, and devolving on a substitute a delegated duty. By custom the Magistrates appoint or license the pilots on their application, accompanied by certificates from the Trinity House. bearing that the applicant has been examined and found to be qualified; but this did not constitute the relation of master and servant. Moreover, the Magistrates received no part of the dues of pilotage. They may establish the rate of dues, but no emolument accrues therefrom to the city. The whole sum drawn in each case is divided in certain proportions, between the pilot and the harbour master. The pursuers answered that the Magistrates admit, control, and remove pilots and harbour masters as they please, they take the entire management of vessels coming into the harbour, and they directly participate in the price which is paid for each particular act of pilotage, and these being the facts, the Magistrates are just as liable for damage occasioned by the pilots or harbour master's culpable negligence, as if the Magistrates had been actually at the helm.

The Court, after causing inquiry at the ports of London, Liverpool, Hull, and the Clyde, and the result being a unanimous report that the fees or rates were not accounted for to those from whom the appointment came, that the situations were not purchased, and that there was no instance of the parties so appointing being subjected in damages on account of the pilot or harbour master's misconduct—the Court accordingly altered and assoilzied the Magistrates.

FRASER v.
DUNLOP, &c.
Damages, injury by horse and cart. Liability of master.

22d January 1822.—David Fraser and Father, Pursuers, against Dunlop and Montgomerie, Defenders.—1 S. 258.

An action by Fraser, with concurrence of his father. against Dunlop, a brewer, and Montgomerie, his servant, for reparation of serious injury he had suffered on the public road, from having been run over by a horse and cart belonging to Dunlop, and at the time employed on his business under Montgomerie's charge. The ground of action was, that the pursuer's misfortune arose from the carelessness and inattention of the said Robert Montgomerie in driving his cart upon the footpath where the pursuer was, when he was so rode down, and for whose inattention and carelessness the said Archibald Dunlop is responsible, and liable to indemnify the pursuer for the loss and damage sustained by The Lord Ordinary found the action relevant against the servant, and reported the case as to its relevancy against The Court found the libel, as laid in this case, the master. relevant to infer claim of damage against both parties.

Anderson v.
BrownLee.
Liability of
master for ser-

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7th June 1822.—Anderson, Suspender, against Brownlee, Charger.—1 S. p. 474.

Brownlee employed Anderson and Ralston to deliver a quantity of wood to H. & R. Baird, in the course of doing which a shed belonging to the Bairds was driven down. For reparation of the damage thence arising, the Bairds were found entitled in an action against them to retain part of the price. Brownlee then brought an action of relief against Anderson, on the allegation that the damage had been occasioned by the negligence of his servant. son's defence was, that he was employed by Ralston and not by Brownlee, and that the claim lay against the former. The Inferior Court, however, on proof, found that he had contracted directly with Brownlee to deliver the wood, and The Lord Ordinary and the Court decerned against him. adhered.

25th February 1825.—Janet Chapman, against William Parlane.—3 S. D. p. 585.

CHAPMAN v.
PARLANE.
Damages for an unfenced building.

The defender was proprietor of an unfinished house in Glasgow. The walls of the house had been built to the height of only a single storey, but there was a sunk flat beneath the level of the street.

On a dark night the pursuer, who kept an ale house in the neighbourhood, was passing, and stepped aside for a necessary purpose into the door or entry of the building, across which there was no fence or barrier, and falling into the sunk flat, broke her thigh bone. She required medical attendance for four months, and suffered permanent though not material lameness. In an action of damages the Magistrates of Glasgow gave £50. She advocated, and the Court remitted to increase the damages to £250.

4th July 1826.—BAIRD, Advocator, against Hamilton, Respondent.—4 S. p. 790.

BLAIR v. HAMILTON. Injury by horse and cart. Liability of master.

An action to recover damage for injury to a child thrown down by a horse and cart belonging to Baird. It appeared from the proof that the horse and cart had been entrusted to a servant, a lad about seventeen or eighteen years of age. and that while passing through Williamsburgh, near Paisley, loaded with dung, the horse and cart, being about a yard and a half from the footpath, on the wrong side of the road, knocked down the child, who was then playing on the road in front of her father's door, and severely bruised her right The servant was at the time about 100 vards behind his cart. No evidence was produced to shew that the servant was either a right person to act as a driver, or that he had formerly been guilty of negligence. The Sheriff found £40 of damages against Baird. The defender advocated, maintaining that before liability could attach to a servant for injuries done ex culpa of his servant, there must be some negligence or blame on the master's part; and that the carelessness of the father in allowing the child to play in the public road, barred such a claim.

BATED # HAMILTON. Injury by horse The Court unanimously repelled the reasons of advocation.

LORD GLENLEE.—There is a great deal in the simple ground that and cart. Lia-bility of master, the damage was done by the defender's horse and cart, where no one was looking after them, nor is it a sufficient defence for the party to say, 'I hired a servant to attend to it.' The master is liable for the carelessness of the servant. It is essential, however, that the damage should arise from the way and manner of doing the master's work. For suppose a servant takes offence at another man, and horsewhips him, though at the time he is conducting his master's cart, yet the damage is not inflicted in the doing of it, he is acting for himself, and the master is not liable. But, in this case, the injury was done by the master's horse and cart, and by the negligence of his servant.

LORD ROBERTSON.—The question to be decided is correctly stated in the pursuer's information. Is a master liable for damages in reparation of an injury inflicted by his servant through carelessness and negligence, in the performance of some work committed to him by the master? I am of opinion that he is. It is necessary for the safety of the public, that masters should be bound to employ servants of such character as will conduct their carts with safety to

the public.

LORD PITMILLY.—There are two things which go to decide it— 1. The servant was doing an act, which he was specially hired and employed by his master to perform, wherein it is distinguished from the case of Linwood, where no orders were given to cut down the tree which occasioned the injury; 2. The accident happened from the omission of ordinary caution in performing that act. also differs from the case of Linwood, where it was merely a casus The case of Fraser v. Dunlop is clear in principle, for the decision there was on the relevancy; and in Lord Keith v. Keir, in which I was counsel for his Lordship, although it appears a hard case, the decision, I am satisfied, was right in principle, for as he was employing his servants to clear the muir, though not in the way they adopted, the accident happened doing a deed which he had employed them to perform.

LORD JUSTICE-CLERK.—This is not a mere case of accident, as the majority held it to be in Linwood, which I accordingly throw out of view, but one of gross negligence and culpability by the servant in doing an act which he was employed by his master to perform, and I conceive that a master is bound to employ persons of competent He is under a duty to the public to do this, skill and carefulness. and if he fail he is liable in the consequences. As to the case of Keith, although I may in giving my opinion in Linwood, have expressed a doubt of it as it is reported, I am satisfied that it was well decided as the facts really stood. It appeared from the session papers, that Mr. Keir authorised the servants to make use of fire, a most

important circumstance not noticed in the report.

1826. King's Bench, Trinity Term.—LAUGHER v. POINTER, LAUGHER v. -5 Barn, and Cres., p. 547.

POINTER. Injury through carelessness of coachman.

Plaintiff brought an action to recover damages occasioned Whether hirer to his horse, said to have been sustained by the negligent conduct of the defendant's servant, in driving a carriage and horses of the defendant. The defendant usually resided in the country, but, being in town with his own carriage, sent. in the usual way, to a stable-keeper for a pair of horses for the day. The stable-keeper accordingly sent the horses. and a person to drive them. The defendant did not select the driver, and had no previous knowledge of him. driver had no wages from the stable-keeper, but depended upon receiving a gratuity from the persons whose carriages he drove. The defendant gave him five shillings as a gratuity for his day's work; but the driver had no power to demand anything. The Lord Chief Justice directed a non-A rule for a new trial was afterwards granted, and there being a difference of opinion on the bench, the case was ordered to be argued before the twelve judges. A full discussion ensued on all the prior cases, and the judges were not agreed in opinion. The case came back for decision to the King's Bench.

LITTLEDALE, J.—According to the rules of law, every man is answerable for injuries occasioned by his own personal negligence; and he is also answerable for acts done through the negligence of those whom the law denominates his servants, because such servants represent the master himself, and their acts stand upon the same footing as his own. In the present case the question is, Whether the coachman, by whose negligence the injury was occasioned, is to be considered the servant of the defendant? For the acts of a man's own domestic servants, there is no doubt but the law makes him responsible; and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master, either personally, or by those who are entrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him.

This case, however, is not the case of a man employing his own immediate servants, either domestic servants, or others engaged by him to conduct any business, or employment, or occupation carried on by him. For the jobman was a person carrying on a distinct employment of his own, in which he furnished men, and let out horses coachman.

LAUGHER v. to hire, to all such persons as chose to employ him. This coachman Injury through was not hired to the defendant; he had no power to dismiss him. carelessness of He paid him no wages. The man was only to drive the horses of the jobman. It is true the master paid him no wages, and the whole which he got was from the person who hired the horses; but that was only a gratuity. It is the case with servants at inns and hotels. Where there is a great deal of business, they frequently receive no wages from the owner of the inn or hotel, and trust entirely to what they receive from the persons who resort to the inn, and yet they are not less the servants of the innkeeper; they are not servants upon wages, but servants upon expectation of gratuities. And therefore. if the defendant is, in this case, to be answerable for the acts of the driver provided by the jobman, it must be upon this principle.—that if a man, either for his benefit or pleasure, employs an agent to conduct any business, such agent is to be looked upon in the same light as if he were the immediate servant of the employer, and that the owner of the property, by employing such an agent to transact his business, confides to him the choice of the under workmen; and then the principle must go on to this, that such agent and under workmen are to be considered in the same light as the foreman or manager of a person in conducting his business, and as the workmen selected by such foreman or manager; and that it makes no difference to persons who receive an injury, in what light the offending party stands to the principal, whether as an under workman employed by an agent, or an under workman employed by the foreman of the principal; and that the only thing to be looked to is, Whether in the end the principal pays for the employment in the course of which the injury is occasioned. But I think that, upon principle, the rule cannot be carried so far. Suppose a man has a ship, or carriage, or other thing to repair, and he, instead of having the repairs done on his own premises, and by his own servants, sends it out to be repaired by a person who exercises the public employment under which it would be repaired, and any damage happens in the course of the repair by the negligence of the persons employed, these are employed by a person who may be considered the agent of the principal, and yet the law would not hold the principal liable. If a man hires a carriage and horses to travel from stage to stage, the carriage and horses are employed for the benefit or pleasure of the traveller, instead of using his own, which he may not do, either from inability to keep horses, or a desire of expedition, and yet the law has never considered the traveller liable. There is no difference in principle between a man's travelling by the stage or travelling by the day. In one case and the other the traveller is using the carriage and horses for his benefit; he pays so much the day instead of so much by the mile; he pays the coachman a gratuity in the one case, and the postilion in the other case, and yet the traveller has never been held liable. The same rule would apply to a hackney coach.

There are, however, cases which have been determined upon principles not altogether consonant to what I have before considered as those upon which the liabilities of parties should be determined, where persons have been held liable for the negligence of individuals LAUGHER v. who were not their own immediate servants, but the servants of Pointer. agents whom they had employed to do their work. In Bush v. carelessness of Steinman, the owner of a house had employed a surveyor to do some coachmanwork upon it; there were several sub-contracts, and one of the work-sible? men of the person last employed put some lime on the road, in consequence of which the carriage of the plaintiff was overturned, and it was held that the owner of the house was liable, though the person who occasioned the injury was not his own immediate servant. So. in Slu v. Edgley (6 Esp. 6), a person had employed a bricklayer to make a sewer, who left it open, in consequence of which the plaintiff fell in and broke his leg. The person who employed the bricklayer was held liable, upon the principle of respondent superior; that he had employed the bricklayer, and was answerable for what he had These cases appear to establish, that in these particular instances the owner of the property was held liable, though the injury were occasioned by the negligence of contractors, or their servants, and not by the immediate servants of the owner.

But, supposing these cases to be rightly decided, there is this material distinction, that there the injury was done upon, or near, and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be, that in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants, or by contractors or their servants. The injuries done upon lands or buildings are of the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by law to himself, and he should take care not to bring persons there who do any mischief to others. But as to Bush v. Steinman, there are some observations to be made. Lord Chief Justice Evre, in the first place, at Nisi Prius, was of opinion that the action was not maintainable; and when the case came before the Court, he says, in the beginning of his judgment, 'that he finds 'great difficulty in stating with accuracy the grounds on which it is 'to be supported. The relation of master and servant, as commonly exemplified in actions brought against the master, is not sufficient: 'and the general proposition, that a person shall be answerable for 'any injury which arises in carrying into execution that which he 'has employed another to do, seems to be too large.' And, in conclusion, he also says, that he still feels difficulty in stating the precise principle on which the action is founded; this case, therefore, does not rest upon the same basis as it would if no such doubt had been expressed. His Lordship also referred to Littledale v. Lord Lonsdale, and Leslie v. Pounds (4 Taun.), decided on special grounds. He then proceeds: 'It may be said that the defendant in the pre-'sent case was owner of the carriage, and that therefore the prin-'ciples of these cases apply; but, admitting these cases, the same ' principle does not apply to personal moveable chattels, as to the

LAUGHER #. Injury through coachmanwho responsible?

' permanent use and enjoyment of land or houses. Houses and land come under the fixed use and enjoyment of a man for his regular carelessness of occupation and enjoyment in life, the law compels him to take care 'that no persons come about his premises who occasion injury to The use of a personal chattel is merely a temporary thing. the enjoyment of which is in many cases trusted to the care and direction of persons exercising public employments; and the mere possession of that, where the care and direction of it is entrusted ' to such persons who exercise public employments, and, in virtue of ' that, furnish and provide the means of using it, is not sufficient to ' render the owner liable. There are many cases where questions ' have arisen upon the liabilities of postmasters, of captains of ships of war, and of owners of ships who have taken pilots, and of factors 'who have acted for their principals, and others, as to what degree of 'possession is kept by the owner. These I have not thought it neces-'sary to notice, because I think the sole question here is, whether, ' if a man employs another to do work respecting personal moveable ' property, and that other furnishes a servant, that servant is to be considered in the same light as a servant appointed by the person ' himself.'

> HOLROYD, J., held that the defendant was responsible for the driver's negligence, and responsible, as being to be considered, in the circumstances of the case, as in law his servant. It appeared to him that the defendant stood in the same situation of responsibility as if the horses had been driven by Bryant (the jobman) himself, or as if they had been driven by a person chosen by the defendant himself: for the driving is equally under the authority and order of the defendant, and equally for his profit, benefit, or pleasure; and the driver he thought equally the defendant's servant for that purpose, whether the driver be Bryant himself, the person directly hired and employed by the defendant, or be another person, selected and appointed by the defendant himself, or a person selected and appointed by Bryant, under the authority or permission of the defend-The question is not whether Bryant, as the owner of the horses. and the immediate master of the driver, might or might not have been made responsible for the driver's negligence. Nor is this the case of a letting for a particular purpose only, such as going to a particular place, as in Dean v. Branthwaite, and Sammel v. Wright, where the hirer was considered not to have the entire management and control over the thing so hired; from which cases the present is distinguishable, because the present hiring was for no such particular purpose, but to go with the carriage where the defendant chose, and to be under his general authority and orders in that respect for a cer-'Although the horses were continued in the custody of ' the driver provided by Bryant, yet, as the horses and driver were to ' be for the use and subject to the general directions of the defendant; 'and as the defendant had a right to retain them till the time for which they were hired was expired, and as they were, at the time ' the mischief was done, in the use and under the directions of the ' defendant, I think that the driver was, for this purpose, in the em-

ploy, and in law the servant, of the defendant, and that the defend- LAUGHER v. ant was in law answerable for the driver's negligence in the execu-Injurythrough tion of the defendant's orders in such employ, in whatever situation carelessness of the driver might also stand with respect to Bryant, with regard to coachman—who responsible to the driver might also stand with respect to Bryant, with regard to coachman—who responsible to the driver might also stand with respect to Bryant, with regard to coachman— Bryant's responsibility for him at the election of the plaintiff. The sible? principle of Bush v. Steinman was referred to as an authority for

this principle.

BAYLEY, J.—If I hire horses of A., and hire B. to drive, B. is, undoubtedly, for the time, my servant. Is the driver less my servant for the time, because I hire him and the horses under one bargain, and allow the owner of the horses to select him? He is employed for me—that cannot be disputed. He drives where I direct. and so as I require nothing contrary to my contract with the owner of the horses, he must obey my reasonable commands. He must go where I order, stop when I require, must go the pace I specify. Though the owner of the horses is, to a certain extent, his master, I am, to a certain extent, his master also. Though the former is his master in general, he has for a time let him out to me; and a master is liable for the acts of one who is in his service or employ, though the master who is to be charged is not his immediate employer, but employs him through the medium of another. If I hire the driver I am responsible for him. If I employ J. S. to hire him, am I not still answerable? I exercise my own judgment in the one case. I leave it to J. S. to exercise a judgment for me in the other; but still it is for me that the judgment is exercised. The service is performed for me. It is my work the driver does. The same principle applied in Bush v. Steinman:—' If a deputy has power to make servants, the princinal will be chargeable for their misfeazance, for the act of the ser-' vant is the act of the deputy, and the act of the deputy is the act of 'the principal.—Per C. J. Holt, in Lane v. Cotton (1 Ld. and 'Raym. 656.) The owner of a ship is liable for the misfeazance of ' the mariners, though he leaves it to the master to select the crew.' The owners of a coach will be liable, though they leave it to J. S. to select the driver and the horses, or though they employ as driver the man who owns the horses. In many instances one proprietor horses a coach for one stage, another for a second, and so on; and in some instances, the man who finds the horses finds the coachman also. Shall this take away the liability of all the proprietors—shall it be said, if the coach does an injury upon a given stage, that the proprietor who finds the horses and driver for that stage alone shall be answerable? The horses and driver are found by the one to do the work of all; they are employed upon the work, and for the benefit of all, and therefore all are responsible. Nor does it appear to me to make any distinction whether the driver and horses are hired for a single day, or for a longer period. Had they been hired by the year, can there be a doubt but that the hirer would have been an-What if they had been hired for a month, or for a Would the difference of period for which they were hired make a difference in the responsibility? Can any legal principle be adduced to make the period the criterion of being answerable or not?

coachman_ who responsible?

LAUGHER v. The driver is equally employed on account of the hirer to do the Injury through work of the hirer, to obey the lawful commands of the hirer, and to carelessness of be the temporary servant of the hirer, whether he is engaged for the day, the week, the month, or the year, and the hirer bears the appearance, for the time, of standing in the relation of master to the driver: and these are circumstances which, in my judgment, make the hirer responsible. On these grounds he thought the defendant liable.

> Abbot. C. J.—This was an action upon the case brought to recover damages for an injury done to a horse of the plaintiff, by the negligent driving of a carriage against it in one of the streets of London. (The Lord Chief Justice, after stating the pleadings, proceeded as follows:)—At the trial before me the plaintiff was non-suited; a rule was obtained for setting aside the nonsuit, and the case was argued, first in this Court, and afterwards before us and the judges of the other Courts at Serieant's Inn; but a difference of opinion has existed, both in this Court and among the other judges.

I take the question to be, whether either of the counts in the declaration was sustained by the evidence given at the trial. dence given was, that the defendant, a gentleman usually residing in the country, being in town for a few days with his own carriage. sent, in the usual way, to a stable-keeper for a pair of horses for a The stable-keeper accordingly sent a pair of horses, and a man to drive them, being the horses and driver mentioned in the declara-The defendant did not select the driver, nor had any previous knowledge of him. The stable-keeper sent such person as he chose for this purpose.

I thought at the trial that the driver could not be considered as the servant of the defendant, so as to sustain either of the first two counts; and also that the horses were not under the care, government, and direction of the defendant, nor driven, governed, and directed by him, so as to sustain the last count; and with all due respect for such of my learned brothers, both in and out of this Court. who think otherwise, I must say that I still entertain the same

opinion.

I will first advert to the authorities quoted, on the one side and on the other. The decisions cited for the plaintiff were the judgment of the Court of Common Pleas, in Bush v. Steinman, as furnishing a principle; and the observation of Mr. Justice Heath, referring to a supposed case, like the present, and assuming that the owner of the carriage would be answerable: Hall v. Pickard (3 Camp. 187), and Croft v. Alison (4 Barn. and Ald., p. 590).

On the part of the defendant were cited Chilcot v. Bromley (12 ves. 114), Dean v. Branthwaite (5 Esp. 35), Sammel v. Wright (5 Esp. 263), and the case of Sir Henry Houghton, before Lord Ellenborough at Warwick. Reference was also made to Pothier's

Treatise on Obligations, Part I., No. 121.

Bush v. Steinman was an action against the owner of a house under repair, and not inhabited, for causing a quantity of lime to be placed on the high road, whereby the plaintiff's chaise was over-

turned and damaged. The defendant, who had never occupied the LAUGHER v. house, had contracted with a surveyor to repair it for a fixed sum. Pointer.
Injury through The surveyor contracted with a carpenter to do the whole, the car-carelessness of penter employed a bricklayer, the bricklayer contracted with a lime-coachmanburner for a quantity of lime, and the servant of the latter laid the who responlime in the road, at the trial before Lord C. J. Eyre, the plaintiff was non-suited, but his Lordship afterwards changed his opinion, and concurred with the other Judges of the Court in granting a new trial, though he confessed he found a difficulty in stating with accuracy the grounds on which the action could be supported. He appears. however, to have been influenced chiefly by the two cases of Stone v. Cartwright, 6, T. R. 411; and Littledale v. Lord Lonsdale, 2 H. These were actions for injury done to a dwelling house. Bl. 299. by the improvident working of a colliery under it. In the first case the owner of the colliery was an infant; the action was brought against an agent and manager, appointed by the Court of Chancery, who hired and dismissed the workmen at his pleasure, but took no personal concern, was not present, and had given no particular directions for working the mine in the manner that occasioned the mis-The defendant in this case was held not to be answerable: and Lord Kenvon said. I have always understood that the action must be brought against the hand committing the injury, or against the owner for whom the act was done. The latter was an action against such owner, and was held maintainable. These cases establish the principle, that the owner of a mine is answerable to the person whose property may be injured by the improvident manner of working it. And if to these we add the case of Bush v. Steinman. the principle will be carried no further, it will only be applied to the owner of a house, and render him answerable for an improvident act taking place in the repair of it. The case of Hall v. Pickard was a question as to the proper form of action, whether trespass or case. It was an action for injury to a horse belonging to the plaintiff, but let by him for a term to a gentleman, whose carriage it was drawing, and by whose servant it was driven, and it was held, that case and not trespass was the proper form of action, for the plaintiff had neither the legal nor actual possession of the horse, so as to maintain trespass. The case of Croft v. Alison was an action for injury to a carriage; the plaintiff, a stable keeper, had hired the carriage of a coachmaker for a day, had furnished horses, appointed a coachman, and let them out to a third person for the day. Under these circumstances it was held, that the plaintiff was the proprietor of the carriage pro tempore.

On the other hand, the case of Dean v. Branthwaite was decided upon the principle, that the owner of horses let to draw the defendant's carriage to Epsom races, under the conduct of postillions appointed by the plaintiff, had not thereby put the horses into the possession of the defendant, so as to preclude him from maintaining an action of trespass against the defendant for an injury done by him to one of them. The case of Sammel v. Wright was an action brought against a stable keeper, who had let four horses in the usual way, to draw a

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I a get a grown of Mr. Pister Heath, in this subject in the see of Bish is theorem, was extra- pricinal. It has the veight proped to be received and the option of a form learned Police, but it would not be received and the option will appoint the propernies. The cases of Irana is Broade cases and type and it Veight, and the case of the Many Mongoton were becaused at the pricing in the were the learness of a complemental properties at their very manufacture of a complemental properties, and the last of the three bears is notly year, the present in the present case.

Howay made these remarks upon the firmer uses. I will now proceed to make some observations upon the case as it might stand only product of prior decisions. I admit the principle that a man is answerable for the conduct of his servants in matters done by them in the exercise of the authority that he has given to them, and also which is the same thing in other words) that whatever is done by his notherity is to be considered as done by him. I am sensible of the difficulty of drawing any precise or definite line as to time or dictance. But I must own that I cannot perceive any substantial

difference between hiring a pair of horses to draw my carriage about LAUGHER v. London for a day, and hiring them to draw it for a stage on the road Pointer.

Injury through I am travelling, the driver being in both cases furnished by the carelessness of owner of the horses in the usual way; nor can I feel any substantial coachmandifference between hiring the horses to draw my own carriage on who responthese occasions, and hiring a carriage with horses of their owner. If the hirer be answerable in the present case, I would ask on what principle it can be said that he shall not be answerable if he hires for an hour, or for a mile? He has the use and benefit, pro tempore, not less in the one case than in the other. If the hirer is to be answerable when he hires the horses only, why should he not be answerable if he hires the carriage with them? He has the equal use and benefit of the horses in both cases, and has not the conduct or management of them more in the one case than in the other. If the temporary use and benefit of the horses will make the hirer answerable, and there be no reasonable distinction between hiring them with or without a carriage, must not the person who hires a hackney coach to take him for a mile, or other greater or less distance, or for an hour, or longer time, be answerable for the conduct of the coachman? Must not the person who hires a wherry on the Thames be answerable for the conduct of the waterman? I believe the common sense of all men would be shocked if any one should affirm the hirer to be answerable in either of these cases. be said that the hirer is not answerable in either of these cases, because the coachman and the wherryman are ready to attend to the call of any person who will employ them? I answer, so also is the stable-keeper. If it be said that they are obliged to obey the call of any person when they are on the stand, or at the stairs, I would ask, Will there be any difference if they are spoken to beforehand, and desired to attend at a particular hour? which is not an unusual occurrence where persons have an engagement to go out at an early hour in the morning. If the personal presence of the hirer will render him responsible, why should he not be equally so if he is absent, and has hired the horses or carriage for his family or servants? Does his presence give him any means of superintending or controlling the driver? Can any legal obligation depend upon such minute distinctions? If the case of a wherry on the Thames does not furnish an analogy to this subject, let me put the case of a ship hired and chartered for a voyage on the ocean, to carry such goods as the charterer may think fit to load, and such only. accidents have occurred from the negligent management of such vessels, and many actions have been brought against their owners, but I am not aware that any has ever been brought against the charterer, though he is, to some purposes, the dominus pro tempore; and the voyage is made not less under his employment, and for his benefit, whether he be on board or not, than the journey is made under the employment and for the benefit of the hirer of the horses. Why, then, has the charterer of the ship, or the hirer of the wherry or the hackney coach, never been thought answerable? I answer, Because the shipmaster, the wherryman, and the hackney-coachman,

coachman. who responsible?

LAUGHER v. have never been deemed servants of the hirer, although the hirer Injury through does contract with the wherryman and the coachman, and is bound carelessness of to pay them; and the pay is not for the use of the boat, or horses, or carriage only, but also for the personal service of the man. the case now before the Court, the hirer makes no contract with the coachman; he does not select him; he has no privity with him; he usually gives him a gratuity, but he is not by law obliged to give him anything; and from thence I conclude that the coachman is not the servant of the hirer. And if the coachman is not the servant of the hirer on such an occasion, but is chosen and entrusted by the owner of the horses to conduct and manage them. I think it cannot be said that the hirer has in law, what he certainly has not in fact.—the conduct and management of the horses. If the coachman is, in such a case, the servant of the hirer, he may at any moment require him to quit the charge of the horses, and deliver them over to another, and must be obeyed; but I think it cannot be said that the coachman may not lawfully refuse, and ought not in most cases to do so. It does not seem to be doubted that the injured party may sue the owner of the horses; is there, then, any any rule of law, or any principle of convenience, requiring that he should have his choice of suing either the stable-keeper or the hirer at his election? Generally speaking, the one is as well able to pay damages as the other, and may be as easily found out and known, and more easily if the carriage and horses are hired together. Should the hirer be held responsible in the first instance, he must certainly have his remedy against the letter; so that the letter will, in the end, be answerable; and there will be a circuity of action which is inconvenient, and to be avoided, if possible.

I have acknowledged the difficulty of drawing a line with reference to time or distance, and I think we must look to other circumstances in order to ascertain the obligation of the hirer. of time may, in itself, be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice of the coachman. The payment of board wages and the furnishing a livery may also be circumstances worthy of attention, because they also may, in some cases, be considered as evidence of a choice and a contract. I do not pronounce upon any case of this kind,—I speak only of the present case, and of the evidence given at the trial; and not being able to find any reason satisfactory to my own mind by which the defendant in this cause can be made answerable in the present action, I think myself bound to say that, in my opinion, the rule for setting aside the nonsuit ought to be discharged.

Rule discharged.

M'LACHLAN 14th May 1827.—M'LACHLAN against ROAD TRUSTEES.-4 Mur., p. 216.

v. ROAD TRUS-TEES. Injury from obstruction on.

This was an action of damages against Road Trustees, liable. for injury done to the pursuer by the overturn of his gig.

Defence.—Non-liability, and that the damage was caused by the pursuer's rashness and inattention.

Issue,—Whether the said overturn was caused by the fault or negligence of the said Trustees, to the injury and damage of the pursuer.

The claim was made for negligence in not shutting up an old road.

L. C. COMMISSIONER.—The case is of importance to the parties. for if the pursuer should get redress, the defenders are individually liable, and have no fund from which to pay damages, if found due. They have no interest in the road farther than residing in the neighbourhood. This, however, will not free them from responsibility, if a case of negligence is made out against them. The issue is, - Whether the trustees discharged their duty in protecting the public travelling on the road; for if they did, the pursuer has mistaken his party. The evidence shows that the intention was to shut up the road on which the pursuer was overturned, and that a strong paling was put up for this purpose; and you are to say whether it remained in such a degree of preservation as that this road was shut up. No transaction between the trustees and Lord Stair, who was to get the property of the old road, can affect the pursuer. The important consideration here is, at what time the responsibility of the trustees is to terminate; for if the responsibility was at end, so is their liability; and the road was shut up for a year and a-half; and if you are of opinion that by this length of time, and the acts done by the trustees to warn the public their obligation to keep up the paling was at an end, then they are not liable.

It was correctly stated, that in every case of this kind there are two ingredients. There must be fault in the party setting up an obstruction on the road, or omitting to set up an obstruction to prevent danger; and there must, on the other side, be in the main ordinary care and attention. If there is any unfitness or impropriety in the party injured, or if, by usual care and attention, the injury would have been avoided, then the party putting or omitting to put the obstruction, is not liable. The person claiming must come with clean hands. You will consider whether the pursuer acted in the manner he ought to have done in a dark night, and knowing that the change had been made on the road.

Verdict for pursuer, L.21 damages.

M'LAREN v.
RAE, &c.
Injury from
horse and cart;
negligence of
servant—master liable.

M'LAREN v. 10th December 1827.—M'LAREN against RAE, &c.—4 Mur., RAE, &c.
injury from p. 381.

The issue here was,—Whether, on or about the 11th day of September 1826, in the street called Gallowgate, in the city of Glasgow, a horse and cart, the property of the defender, John Rae, and under the management of the defender, Thomas Downes, then acting as his servant, did, through the fault, negligence, or want of skill of the said Thomas Downes, cause bodily harm to the pursuer, to the loss, injury, and damage of the pursuer.

Defence.—The master is not liable for the culpable negligence of his servant, nor for an accident.

RUTHERFORD, for Rae.—The facts proved are, that while the servant was leading two carts, the horse of one bolts off. The regulations of police, requiring a person to be at the head of the horse, are not carried home to the defender. The question here is, whether there was great negligence. In the case of Linwood strong doctrines are laid down, but the question is, whether the accident was likely to happen. Here there is merely a legal responsibility, and the facts raise a question of law.

L. C. COMMISSIONER.—You are to consider the situation of the parties; and the point to be made out is negligence, not malevo-This is not, by the issue, whether there was a culpable act of the servant, or whether it was wilful disobedience of orders, or without or beyond his employment, but whether the servant did not do what was necessary for the protection of the public. act of the servant, to make his master answerable for it, must be in the regular course of his duty. The fault must arise from want of skill or attention, and not from a wilful act. A criminal act will not subject the absent and innocent master. The Police Act being public, all are bound to notice it, but it carries the matter very little farther than the common law; and the question is, whether the cart in the situation of this one was dangerous to the public, and whether one of the men ought not to have been at the horse's head. The question here is, on the common law, whether this person was in his common employment, and was negligent,-whether there was such diligence used as is requisite to free passengers from injury; and it is clear that the accident would not have happened if there had been any one at the horse's head.

Verdict for pursuer, damages against Rae, L.75; and against Downes, 1s.

24th December 1827.—MILLAR against HARVIE.—4 Mur., p. 385.

MILLAR v.
HARVIE.
Injury from
horse and cart;

An action of damages against a master and servant, for sides—is mascausing the death of the pursuer's child through the negli-ter liable? gence of the servant.

The pursuer pled that the case was simple,—both master and servant are liable. The servant was drunk, and sitting in one of the two carts with only a single rein.

Defence.—This is a hard case, I only appear for the master; it is, in fact, a trial for culpable homicide against a person who was not present. The questions are, whether the death was caused by Wilson, and whether, if he was here and silent, the master would be liable. There is no furious driving, or out of the regular course, and then the child came in the way from the negligence of its parents. Having employed a careful servant, the master is not liable in solatium, though he might be liable for actual loss.

L. C. COMMISSIONER.—An action of this sort is very rare, and this is the first of the kind in this Court. The question here is not the civil liability of the master to repair damage done by his servant. but whether he shall pay a sum of money as a consolation to a parent for his mental suffering for the death of his child, when there has been no public prosecution of the servant. Throughout the empire an action may be brought for the expense caused by such an act as is here charged; and by the law of Scotland the action is relevantly brought for reparation of the mental suffering by the parent. But still there is a question before you, whether, on the evidence, you are to find beyond the actual expenses incurred. This is an action founded on the liability of a master for an act by a servant out of his sight. We had very recently occasion to consider the law on this subject, and though the facts of the one case do not bear upon the other, the law is the same in both. is laid on the fault and negligence of the servant, and it could not Neither here nor elsewhere could it be held have been otherwise. that the master is liable for the wilful acts, or criminal acts, of a servant, but he is liable for want of skill and attention, as he must employ skilful and attentive servants. He is civilly liable for the fault, negligence, or want of skill of the servant; but is not liable for wilful acts out of the duty he has to perform. The employer is clearly liable, but with this limitation, that if the person is in the regular discharge of his employment, and if the blame is in the person suffering, he must submit to the injury. But there are shades of cases and degrees of blame on both sides which must be considered. Here you must consider the facts proved, and the

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MILLAR OL HARVIE. Injury from

degree of blame of leaving this child in the street,-that the child had wandered to the opposite side of the street into a situation Injury from horse and cart; where it was not to be expected,—and then make up your minds. faults on both The case is not one of rash, but of negligent and faulty driving; sides—is mas- and if a servant is in the habit of acting in this manner, the master ter liable? must be held to know it, and be liable for keeping a servant of that character. It is established that, though the servant was drunk at the time, he was not habitually so. Had he been a habitual drunkard, the master was clearly liable; but if this was accidental drunkenness, the master was not on that ground accountable.

This brings it to the pure question of whether there was such freedom from fault on the part of the pursuer, and such fault on the other side as to render the defender liable; he considered there was carelessness on both sides. If the carts were improperly equipped, and the driver sitting on them with a single rein, and if they were in a wrong place, then this is fault and negligence for which the master is liable, and you must assess damages. The expense of the funeral is easily ascertained, but the solatium he left to themselves.

Verdict for defender.

MILLAR v. ROAD TRUS-TEES. Injury while road under repair.

17th July 1828.—MILLAR against ROAD TRUSTEES.-4 Mur., p. 563.

This was an action for damages caused by the negligence of the Road Trustees.

The Defence was,—No negligence, and that the damage done was caused by the gross carelessness and illegal conduct of pursuer.

The defenders had been repairing the road, and cut down a half of it about four feet lower than the other half, without, it was alleged, having taken the proper precaution for the safety of passengers. The pursuer, while travelling in his cart in the dark, suffered injury by its being overturned. The trustees said that they were only doing their duty in improving the road, that the pursuer was sleeping in his cart, and did not use reasonable care.

L. C. COMMISSIONER.—In repairing the road, the trustees are bound to do so with the utmost caution, and employ careful workmen; but there is also an obligation on the public to take reasonable care. Here, if the trustees did not do what was necessary fully to protect the public, they at least took some means; and you will consider whether the other party has done what he was bound to do. If you think the trustees ought, in addition, to have put

up a rail, that will go far to subject them; and you will also consider the evidence as to the watchman not being sufficiently alert. But there are circumstances on the other side. This was not the Injury while case of a common carter, but a carrier who knew the condition of road under rethe road; that he had a dog which might prevent the watchman pair. from doing his duty; and though it is extremely to be regretted that a traveller should suffer in his person or pursuit, still you must consider the conduct of the pursuer; and if he acted as a person ought not to have done in the prospect of passing such a place on the road, you cannot find for him.

Verdict for pursuer, damages L 100.

7th February 1832.—ALLAN and SIMPSON, Pursuers. ALLAN & SIMPagainst J. H. MACK, Defenders.—10 S. D., p. 349.

SON v. MACK. Landlord liable for injuries caused by inse-

The defender, as judicial factor on Cliftonhill, let the cure old pits on parks by public roup in March 1829, and the pursuers took one of them for grazing horses, employed by them in working pits in the neighbourhood. One of the horses put into the park at night was, after search, found lying dead among the water at the bottom of an ironstone pit on the estate. at a small distance from the park. The pit lay within a yard of the highway from Edinburgh to Glasgow, and no fence intervened between it and the highway. Previous to the accident it was covered over with boards, which had become rotten, and in which a hole had been for sometime observable. There was long grass growing at the side of the pit, but there was no fence around it. The action was for the value of the horse, and damages for the stoppage of the work The defence was, that the minerals on the in consequence. estate had been let to Dixon before the defender became factor; that Dixon had sunk the pit, and wrought it for several years, and the lease was still current; he therefore contended that Dixon alone was liable, the more especially as the pursuers were servants in the employment of Dixon. plied, that the condition of the pit showed it to have been long disused; but the proprietor of the ground was liable, reserving to him such relief, if competent. The sheriff gave damages. In an advocation the Lord Ordinary concurred. and on a Reclaiming Note, the Court unanimously adhered.

LORD GILLIES.—If a horse starts off the highway and falls into

ALLAN & SIMP-an unfenced pit, the owner may go directly to the landlord of the SON S. MACK. Ground for his damages, and is not obliged to seek out and raise a question with a tenant in the first instance. There are cases in which caused by inse-perhaps the tenant may not be liable, but the landlord is; and where cure old pits on both are liable, the sufferers may go against the landlord, and leave his property. him to take his recourse against the tenant.

M'KENZIE v. 14th January 1834.—MACKENZIE against M'LEOD.—Bing. Damage by 10, p. 385.

servant setting fire to chimney, to clean it.

Lady M'Kenzie pursued Colonel M'Leod for the loss of a in attempting house and furniture in Scotland, let by her under an agreement to use it as tenant. It appeared that the defendant hired the house and furniture in question of the plaintiff for one year, at a rent of L300. An inventory of the furniture was drawn up and signed by the parties: and an undertaking was annexed, that the defendant would deliver up all the articles specified in it at the termination of the The defendant took possession of the house, and occupied it with his family. There was one room in it in particular, where the housemaid could not keep a fire lighted, in consequence of the chimney smoking. that part of the country chimneys are cleaned by carpenters and masons, and the chimney in the house had been cleaned by them in the presence of the housemaid. On the defendant's taking possession of the house, however, the housemaid, thinking that the smoke was occasioned by the accumulation of soot, told the cook that, having known chimnevs frequently cleaned by burning furze and straw in them. she would try that mode the following day. The cook cautioned her against such an experiment, notwithstanding which she carried it into execution, and the consequence was that the house was burned down, and a portion of the furniture destroyed. It was proved on the trial that, according to the law of Scotland, if a house be burnt down, through an act of misconduct or negligence done by a servant of the tenant, in the ordinary scope of the servant's duty, the tenant is liable to his landlord for the loss so occasioned: he is also bound, at the end of the term, to deliver up articles let with a house, whether he has specifically agreed to do so or not.

In leaving the case to the jury, Tindal, C. J., told them Mikensze v. Mileon. that, if they thought the act of the servant, in consequence Damage by of which the accident had occurred, was done within the servant setting general scope of her duty, they should find the verdict for fire to chimney, the plaintiff; but if it was not an act within the general to clean it.

scope of her duty, then they were bound to find for the defendant. The jury found a verdict for defendant.

The plaintiff moved for a rule to shew cause why the verdict should not be set aside on the ground of misdirection, and of the verdict being also contrary to evidence.

Tindal, C. J.—Notwithstanding the argument we have had, I think there is no ground for ordering a new trial in this case. With regard to the defendant's liability in respect of the house, I left it to the jury to say whether the damage had been occasioned by the servant acting within the scope of her employment. The jury found that it was not. It has been contended to-day, that as the object of the servant was to light a fire, she was acting within the scope of her employment; but she stated that her object was not merely to light the fire, but to clean the chimney, and she was well aware that it was not her duty to clean the chimney, because she had seen it done by the carpenters and the masons. I am therefore unable to reconcile my mind to the proposition, that when she had a definite intention of cleaning the chimney, she can be considered as acting within the scope of her employment, which was merely to light the fire.

With respect to the furniture, he held the special undertaking to redeliver made no difference in the liability; he would have been liable to redeliver by Scotch law, and in England, where, by custom, a tenant is bound to repair, under the common law, he is not liable to rebuild in case of fire, so the meaning of this agreement is, that any little loss or damage in the course of the term shall be made good by the defendant, but it is not framed with the view to cast on him

a total loss by fire.

PARK, J.—Agreed on both points. As to the furniture, the Scotch law with respect to the defendant's liability, carrying that liability no farther than the written obligation, I think he is not liable to

replace furniture destroyed by fire.

Bosanquer, J.—Concurred. The direction of the Chief Justice consists with the evidence as to the Scotch law. When an injury occurs from anything done in the particular or general employment of a servant, the master is liable for the consequences. Here the jury have found that the injury did not accrue from anything done by the servant within the scope of her employment, and upon this evidence we cannot say they are wrong.

ALDERSON, J.—Concurred. The words 'servants' duty' may convey several meanings. They may mean cases where the duty is defined by precise orders, or where something is directed to be done, and the manner of doing it is left wholly to the discretion of the ser-

in attempting to clean it.

M'KENZIE v. vant, or where the manner of doing it is only left partly to his discretion. In the first case, the act of the servant is the act of the mas-Damage by tion. In the first case, the act of the servant is the act of the mascarelessness of ter; in the second, the judgment exercised may be considered the servant setting judgment of the master, and the master must be responsible. fire to chimney, where he has neither ordered the thing to be done, nor allowed the servant any discretion as to the mode of doing it. I cannot see how. either in common justice or common sense, the master can be held responsible. To apply this principle was the business of the jury, and I think they have applied it correctly. It was neither the province of this servant to clean a chimney, nor had she received any orders on the subject, but, on the contrary, had been cautioned against the course she pursued.

Rule refused.

TER v. EDINR. & GLAS. UNION CANAL CO. Injury from carelessness of a servant in drawing up bridge.

NIVEN OF HUN-16th March 1836.—MARY NIVEN OF HUNTER, Pursuer. against THE EDINBURGH AND GLASGOW UNION CANAL COMPANY, Defenders.—F. C. 11: Jury Sittings, p. 19.

> This was an action of damages by the pursuer for injury sustained by her in consequence of the alleged fault, negligence, and want of skill on the part of a servant of the defenders, in the management of the drawbridge on the canal near Edinburgh. It was admitted that William Cuninghame was employed by the defenders to manage the drawbridge.

> It appeared that the pursuer and other two women had reached the bridge on their way from Edinburgh to Dalma-They got on the bridge together, without having or heard any intimation that it was in the act of being raised by Cuninghame for the purpose of enabling one of the heavy passage boats to pass along the canal. bridge rose in one piece, by means of a crank worked by Cuninghame, who, in doing so, had his back to the street by which the pursuer reached the bridge. There was no chain or rope placed across the bridge, nor any warning given to them not to go on it. The bridge rose when the pursuer was on it, and leaped from the bridge when it was at its height, and fell on one of her companions, knocking her to the ground. The pursuer suffered severe injury.

> The defence was, that there was here no question of liability against the Company for want of chains, or other precautions, but the sole question was, whether they were liable to the pursuer for the injuries suffered from the fault

or negligence of Cuninghame?—and that nothing was proved Niven or Hunto shew want of skill, or fault, or negligence in him, who & GLAS. UNION was a man of good character; but the accident was attribut-Canal Co. Injury from able entirely to the foolhardiness of the pursuer, to whom carelessness of the raising of the bridge ought to have been a sufficient drawing up a warning. Besides, it was proved that the driver of the boat bridge. had called out to the women, warning them of their danger, and that others on the spot had given like warning.

LORD PRESIDENT HOPE.—The way the issue was framed, implied a finding of the Court that the company should be made answerable for the negligence of Cuninghame, in the management of the bridge. His business was not only to manage the bridge for the safety of the passage-boats, but also for the safety of foot passengers, for whose accommodation the bridge was constructed. It was his duty therefore to have seen that the bridge was in a condition to answer these objects, and he was bound to inform the company of anything it required. Thus, for instance, if the rail was awanting, he was bound to point that out to the company, -so also I conceive it was equally his duty to have pointed out to the company the want of a chain or rope to shut up the communication at the time of elevating the bridge, in order that the passengers might have Such I apprehend to have been timeous warning of the fact. the nature of the general management devolved on Cuninghame by the company. Now, in this view, I consider that no parallel can be drawn between the danger to passengers from vehicles in a crowded thoroughfare, where there is danger both in proceeding and going back, and the danger incident to a bridge such as this, where a person might be safely turned back. You are therefore to make allowance for the confusion and trepidation into which the pursuer was thrown, and to take into consideration her natural desire to follow I can only thereby account for the folly she her companions. evinced in leaping from the end of the bridge to the other side of the canal; for as the bridge rose in one piece, to feel it rising was certainly a broad hint to any reasonable person to return. But let us look at the facts (his Lordship then recapitulated the evidence). It is now for you to say if there was in any way fault or negligence in the management of the bridge by Cuninghame. I think he was to blame, yet at the same time, I certainly think the woman was in fault also; though no doubt allowance must be made for the agitation and confusion into which she was thrown. In these circumstances, you must consider if this is a case for damages, and, if so, what is to be their amount?

The Jury unanimously returned a verdict for pursuer. Damages £100.

ATTERN .. DOUGLAS. (Peebles Road Trustees.)

5th Jan. 1836.—Mrs. MARGARET AITKEN, Pursuer, against ROBERT D. DOUGLAS. (Clerk to the Peebles-shire Road Trustees). Defender.—14 S. D., p. 204.

A breach was made in the turnpike road in consequence of a river breaking in upon it. The river was swollen at the time, and William Aitken, driving a cart along the road in the evening, fell into the river, with his horse and cart, and was drowned. His widow claimed damages.—The issue was, whether the accident took place 'by the fault or negli-'gence of the said Trustees or those in their employment.'

It appeared that a servant in the employment of the Road Trustees, and having charge of the road, though he was aware of the dangerous state of the road, and had intimated, a few hours prior to the accident, that he was afraid some lives might be lost, had taken no precaution for the protection of the public. It also appeared that Aitken had been driving with some negligence, as the reins were found tied to the cart when it was taken out of the water. these circumstances, the defender, at the conclusion of the pursuer's proof, stated that he had not been previously fully aware of the negligence of the servant of the Road Trustees. and offered £250 of damages and expenses. The pursuer accepted of the offer. And verdict of consent was returned accordingly.

FOWLER. Injury from break-down of a van.

PRIESTLY v. 23d Nov. 1837.—PRIESTLY against FOWLER.—L. J. (1838): Exchequer Rep., p. 43.

> The plaintiff was a servant of defendant, in his trade of butcher, and the defendant had desired him to go with a van belonging to the defendant, conducted by another of his servants, in carrying goods for him, on a certain journey. He accordingly went, the van broke down, being overloaded, and the plaintiff was thrown with violence to the ground, and fractured his thigh. The case was maintained on the ground that the defendant was bound to have the van in a good state of repair, and that it should not be overloaded. but that he neglected these duties.

The Defence was, that before an action can be maintained, PRIESTLY v. plaintiff must at all events prove—1st, That the van was Injury from overturned with the defendant's knowledge; 2d, That the break-down of a van. plaintiff was ignorant of the overloading; 3d. That the plaintiff was ordered to go in the van; 4th. That it was necessary for him to go in the van in the discharge of his master's duty: and. 5th, That the master's command was a Farther, it was pled that the overturn was a legal duty. mere accident, for which defendant was not responsible.

LORD ABINGER, C. B.—It is admitted that there is no precedent for the present action by a servant against a master. We are, therefore, to decide the question upon general principles, and, in doing so. we are at liberty to look at the consequences of a decision the one way or the other. If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage, therefore, is responsible for the sufficiency of his carriage to his servants, he is responsible for the negligence of his coach-maker or his harness maker or his The footman, therefore, who stands behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-makers, or for a defect in the harness, arising from the negligence of the harness-maker, or for the drunkenness, neglect, or want of skill in the coachman. Nor is there any reason why the principle should not, if applicable to this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chamber-maid in putting him into a damp bed; for that of the upholsterer in sending in a crazy bedstead, whereby the servant was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to health; of a builder for a defect in the foundation of the house, whereby it fell and injured both the master and the servant in the ruins. The inconvenience, not to say the absurdity, of these consequences, afford a sufficient argument against the application of this principle to the But in truth the mere relation of master and servant present case. never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of He is no doubt bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself (Laison v. Kirk, Lane's Rep. 67). And in most of the cases in which danger

PRIESTLY v. FOWLER. Injury from break-down of a van.

gence.

may be conceived, if not all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment described in this declaration, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could pos-We are, therefore, of opinion that the judgment ought sibly afford. to be arrested.

BRIDGE v. Exchequer Pleas, 1838. — BRIDGE against THE GRAND GRAND JUNCTION RAILWAY COMPANY.—3 Mees. and Wels., p. 244. Railway collision—negli-

The case alleged that the plaintiff, being a passenger on the defenders' line—the Liverpool and Manchester Railway—suffered injury by a collision on the line, caused by the careless, negligent, and improper behaviour of the servants of the Company in the management of the train. In defence, it was maintained that the train in which the plaintiff was a passenger did not belong to them, nor was it under the care and management of them, or their servants, but under the care and management of other persons; and that it was the mismanagement and neglect, and improper actings of those in the management of the train where the plaintiff was, that occasioned the collision and injury; as also the negligence of the plaintiff.

Park, B.—The question is, whether the plea is not altogether bad in substance. It is consistent with all the facts stated in it that the plaintiff (or they under whose guidance he was) was guilty of negligence, and the defendants also, and yet that the plaintiff is entitled to recover. Can it be said that, because a carriage is on the wrong side of the road, a party is excused who drives against it? It ought to be shown that there was negligence in not avoiding the consequence of the defendants' default. The principle is very clearly stated by Lords Ellenborough and Bayley, in Butterfield v. Forrester (11 East. 60); and that rule is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided

the consequences of the defendants' negligence, he is entitled to Bridge v. recover; if by ordinary care he might have avoided them, he is the GRAND JUNCAUTHON RAILWAY.

Lord Abinger, C. B.—The negligence of the plaintiff, in order to preclude him from recovering, must be such as that he could not, by ordinary care, have avoided the consequences of the defendants' negligence.

Judgment for plaintiff.

21st April 1838.—Randelson against Murray and Another, 8 Adol., and Ellis., 109.

RANDELSON v.
MURRAY.
Liability, master and servant.

The defendants were occupiers of a bonded warehouse in Liverpool, and for the purpose of removing some barrels of flour from their warehouse, they employed one Wharton, who was a master porter in Liverpool, and who used his own tackle, and brought and paid his own men. a master carter, was employed by Wharton to carry the Taylor also sent his own carts, &c., and his barrels away. own men, one of whom was the plaintiff. The injury was occasioned by a barrel falling on him, in consequence of part of Wharton's tackle failing, while it was being used by Wharton's men. On this evidence the defendants contended that the remedy was against Wharton, not against The Judge reserved leave to move for a nonsuit on this point, and directed the jury to find for the plaintiff. if they considered that there had been carelessness in the use of the tackle. Verdict was returned for plaintiff.

Defendants moved for a nonsuit. They admitted that the defendants would be liable, if Wharton and his men could be considered as their servants. Bush v. Steinman, admitting that case (which, however, has been questioned) to be law, it was to be distinguished from the present, upon the ground that Wharton, though employed by the defendants, is rather a bailee for a particular purpose than a servant. They referred to Laugher v. Pointer, and Harris v. Baker, also to Witte v. Hugue (2 D. and R., 33), where an engineer had contracted with a sugar refiner to erect a steam-boiler for him. The boiler burst and injured the property of a third party; and the jury having found that

RANDELSON v. the engineer was, by himself or his servants, conducting

MURRAY.
Liability, mas-and managing the operations of the apparatus when the ter and servant accident happened, the engineer was held liable, though the Court intimated, that if the jury had found the other way. there might have been some weight in the objection, that the action should have been brought against the party employing the engineer. Here the facts are substantially the Is the owner of a house liable for an injury caused by a chimney-sweeper, who carelessly knocks a brick from the chimney-top? Yet he is employed by the owner. Probably the only satisfactory rule in cases of this description would be, that the jury, rather than the judge, should decide whether the offending individual be or be not the servant of the party sued. That was directed by Lord Abinger, in Brady v. Giles (1 Mo. and Ro., 494).

> Lord DENMAN, C. J.—Had the jury in this case been asked whether the parties, whose negligence occasioned the accident, were the servants of the defendant, then there can be no doubt they would have found in the affirmative. I see no reason for granting a rule.

> LITTLEDALE, J.—It seems to me to make no difference whether the persons whose negligence occasions the injury be servants of the defendant paid by daily wages, or be brought to the warehouse by a person employed by the defendant. The latter frequently occurs in a large place like Liverpool, where many persons exercise the occupation of a master porter. But the law is the same in each case.

PATTISON, J., and COLERIDGE, J., concurred. Rule refused.

LYON v. MAR-TIN. Illegal seizure of horses by servants.

5th June 1838.—Lyon against Martin.—8 Adol. and Ellis, 512.

The defendant occupied land adjoining a highway, and Horses kept by persons in the neighbourhood had sometimes, and shortly before the act in question, trespassed on the land, and had been distrained by the defendant's servants, and impounded. The plaintiff's horse was on the highway, and had been intentionally driven from it by a servant of the defendant into the defendant's ground, and then immediately seized by the same servant, and taken to the pound. The judge at the trial was of Lyon v. Maropinion, that as the act of the seizure, in the circumstances, Illegal seizure was not within the scope of the servant's ordinary autho-of horses by rity, some direct authority from his master ought to be proved; and this not being done, the pursuer was non-suited

A new trial was moved for, on the ground that the defendant's servants had been used to distrain horses with his authority, and that was a prima facie case of authority in the present instance, and the defendant should have been called on to rebut it; if the master has adopted the servant's act, and if the act was for his benefit, that circumstance, among others, will tend strongly to prove sanction.

LORD DENMAN, C. J.—It is clear that the wrongful act could not be traced to the master. He had authorized nothing that was not lawful. The case here is an act in itself unlawful, and the question then is, whether the particular act was authorized. The instances where an injury has resulted from negligence in performing a lawful service, do not apply.

Pattison, J.—A master is liable where his servant causes injury by doing a lawful act negligently, but not where he does an illegal

one. Every person is to be taken to know the law.

Rule refused.

19th June 1838.—James Findlater, Pursuer, against Findlater v. Duncan.
Thomas Duncan, Defender.—F. C., Vol. XIII., p. 784, Road Trustees.
Damages for accident by obstruction on

This was an action of damages against the Trustees of the bility of trust turnpike road between Dundee and Perth, for reparation of injuries received by the pursuer while driving at night along that road in his gig, with his son. The gig was upset, by coming in contact with a heap of stones, left partly on the footpath and partly on the road, by the servants of the contractor employed by the Road Trustees in executing some repairs. The pursuer's son died, in consequence of the injuries he had received. The action was directed against the defender, as Clerk and Treasurer of the Trustees. The issue put to trial was, Whether the pursuer and his son 'were 'overturned through the fault or negligence of the said

FINDLATER r. 'Trustees, or others in their employment, to the loss, injury, Road Trustees, and damage of the pursuer. At the trial, the Lord Pre-Damages for accident (Hope) charged the jury, in point of law, 'that Road struction on road. Non-lia- Trustees, on a public road, are liable for any injury which bility of trust may happen to passengers, in consequence of the negligence or improper conduct of labourers, or surveyors, or other ' persons employed by the Trustees, or by the officers of the 'Trustees, when engaged in any operation performed under ' authority of the Trustees.' To this charge the defender excepted. The jury found for the pursuer—damages, L800. At the discussion on the exceptions, the defenders pled, that Road Trustees, holding a gratuitous public office, and employing competent persons to perform the necessary operations on the roads, could not be liable, either personally or as Trustees, for any fault or negligence of these parties or their servants, upon whom alone the liability must fall, as appeared from the provisions of the General Turnpike Act. 1 and 2 Will, IV., c. 43, sect. 101. It did not seem to be maintained that they could be made personally liable; but no more can they be subjected in damages as Trustees, for these must be paid out of the trust-funds, and that would be an express violation of the Local Road Act, ordering the tolls to be applied towards making, repairing, upholding, and improving the roads, &c., and paying the expense of management and interest, also the principal of borrowed money-' and to no other purpose whatever'-and that, by the law of England, Road Trustees were never found liable. The pursuer contended, that it was only sought to subject the trustees as trustees, in order to obtain reparation from the trust-funds, which, under the words of the Local Road Act, are to be applied in the general management of the roads, and in keeping them in repair, and might fairly be expended in satisfaction of an injury received, as in the present case, from the want of repairs of the roads, or from the operations in the course of repairing them. That it was the established law of Scotland, that Trustees were liable for the acts of the servants of contractors in performing operations ordered by the Trustees.

> LORD COREHOUSE.—Had the point raised in this case been a new and an open question, I might have had more hesitation in making

But I consider FINDLATER .. up my mind as to the judgment to be pronounced. it to be settled in the law of Scotland, that Road Trustees are liable Road Trustees. qua Trustees, as stated in the direction which has been excepted Damages for against. In regard to the law of England, which has been referred accident by obto, there may be many reasons which would justly influence the road. Non-liaminds of judges in deciding on liabilities arising under their statutes, bility of trust which would not apply in Scotland; and it does appear to me, that funds. the result which would be occasioned in Scotland by the doctrine That result of the defender, is wholly unwarranted by our law. would be, that on the highway, a person who pays toll for keeping it in good repair, might, through the negligence of the persons employed to repair it, be exposed to the severest injuries, and yet have no party but a day-labourer to look to for redress, whose whole means would be utterly inadequate to pay one tithe of the reparation that I think, on the contrary, that Trustees are liable as such, with full relief to them against the trust-funds levied for the roads. This liability has been repeatedly decided. In the case of the Magistrates of Edinburgh it was so held, where servants employed in an operation in the street left a hole in it, which was not sufficiently fenced and lighted, in consequence of which a person fell in, and suffered a severe injury. The Magistrates were not, indeed, Road Trustees, but they were public officers, discharging, gratuitously, a public duty. Then, besides other cases, there were those of M'Lachlan and of Miller, in the first of which the Lord Chief Commissioner, who was well versed in English law, held that it did not apply, and that the liability of Road Trustees was established by the So long, therefore, as our law remains in its prelaw of Scotland. sent state, I must consider that the liability of Road Trustees is undoubted. It would be very dangerous on our part to leave our own law and import that of England per aversionem. The other judges concurred, and the exceptions were disallowed.

The case was brought to the House of Lords by appeal, and argued on 8th July 1839. Jurist, vol. xii., p. 138.

The LORD CHANCELLOR said that, on the merits, the case was one of very great importance: he took time to examine the authorities, the point being one startling to the ears of an English lawyer, viz., that for damage sustained by the conduct of persons in the execution of a public trust, the party sustaining the injury has a remedy, not against the immediate author of the injury, or against the trustees personally, but that he has a direct remedy against the trust-funds, by suing, not the trustees, but the officer of the trustees, who has the custody of the trust-funds: and it is admitted that the effect of this judgment, if it stands, will be, not to give a remedy against the trustees, who may be supposed to be the authors of the injury, but against the trust-fund; and that if that is exhausted in the payment of the damages, that it must be supplied by a taxation on the public. We have no such principle in our law; and though certain cases have been decided by the Court of Session, in which such a verdict has

road. Non-lia- it. funds.

FINDLATER v. been given, I have not heard any principle referred to, which would Road Trustees, have originally supported that decision. If that principle had been Damages for part of the law of Scotland, your Lordships may be sure the industry accident by ob- and learning of the counsel would have furnished some instances of They have furnished instances in which the particular thing has bility of trust been done, but no principle has been referred to, which, if brought under the consideration of the Court, would have given weight to the adjudication.

> On 23d August 1839, at advising, the LORD CHANCELLOR said, there has arisen a conflict of opinion in this country, and in Scotland. upon a point arising under Acts of Parliament, very much depending on the construction of these Acts, and as to which the earliest decision referred to in Scotland is of the year 1798; notwithstanding which the authority of the English decision, as applicable to the rule to be hereafter followed in Scotland, has been objected to, as an attempt to overrule Scotch law by the weight of the decisions of Nothing can be more important than to protect the in-England. tegrity of the Scotch law, in cases where that country has a law distinct from that of England. The titles to property, and the rights and interests of individuals, in Scotland, are regulated by the laws of that country, and, undoubtedly, all such laws ought to be maintained; but, in cases in which there is no peculiar law of Scotland applicable to the subject matter of a contract between parties, but questions of private right and liability arise, to which no preceding principle of law can be satisfactorily applied, there is great inconvenience, and a degree of reproach to the law itself in the adoption, in the two countries, of different and inconsistent rules in the administration of justice: and this can never be more strongly felt than in cases in which the questions arise from enactments of the Legislature which are In looking through the papers in this case, and common to both. upon referring to the authorities quoted, I have in vain sought for any rule or principle of Scotch law, applicable to this question, of an earlier date than the decision under some special acts, which would lead to the adoption of a course of decision peculiar to that country. So far from finding any principle in the law of Scotland for making the liability of persons for the acts of others, acting under their presumed authority, greater than it is in this country, I find the rules laid down, in Linwood v. Vans Hathorn, F. C., 14th May 1817, by a majority of the judges, much more restrictive of such liability than the rule adopted in this country in the case of Bush v. Steinman, (1 Bosanquet and Pullar, 404.) Let it, however, be assumed, that such liability was regulated by the same rules in both countries. questions first arose upon those Acts of Parliament, which create trusts of money, levied for public purposes, in both countries, the Courts had a common principle upon which to engraft such rules as it might be advisable to adopt in administering justice upon questions arising under these acts. In England, it has been repeatedly held, that Trustees of a turnpike road are not liable for damage arising from the acts of those employed in carrying into effect works under the provisions of the Acts. It was held that Trustees, doing only that

which by the Act it was their duty to do, and being guilty of no FINDLATER v. personal default, were not answerable for damages sustained by the Road Trustees. acts or neglect of persons employed by them in the active execution Damages for of that duty. Another class of cases establishes another rule under accident by obthose Acts, viz., that Trustees, exceeding the authority which the Act struction on gives them, are personally liable for the consequences of the act done; bility of trust but, keeping within that authority, they are not liable for any da-funds. mages which their acts may occasion to any other person. The person injured, if he cannot find a remedy in the provisions of the Act, is without redress. (British Plate Manufacturers v. Meredith, 4 Term. Reports, 794.) The Scotch case, Innes v. Magistrates of Edinburgh, did not apply. The liability of the Magistrates was, indeed, established, but upon grounds which have no application to the present case, as it rested upon the supposed duties of the Magistrates of Scotch burghs. The case of the Airdrie Road Trustees, in 1820 (2 Mur. 194 and 215), was apparently settled. The verdict of the jury, that the Trustees did improperly allow, or permit the stones to remain on the road for two or three weeks, was sanctioned by the Court, but a new trial was directed as to the liability of Waddell, the wrong-doer. Whether this finding was right or wrong, it does not much apply to this case. It found a culpable neglect or omission of duty, in not removing the stones, which is very different from finding a liability from the unauthorised act of any person employed in the work. The case of M'Lachlan v. Wigtonshire Road Trustees, in 1827, was what we should call in this country a Nisi Prius case. It was also a case like the last, of imputed negligence in not effectually stopping up an abandoned road; and the claim was against the Trustees personally, the Chief Commissioner saying, 'The trustees are indivi-4 dually liable, and have no funds to pay the damages, if found due. In Millar v. Calder Road Trustees, that point was not taken. Aitken was compromised. The last two cases, therefore, are instances in which the liability of Trustees was assumed, and neither of them has the weight of a judicial decision, except in so far as in the former. the opinion of the Chief Commissioner was expressed. Such is the state of the decisions in England and in Scotland on this subject. The learned judges of the First Division state, that the law has been fully established in Scotland; and, upon that authority, and from what appears from the reported cases, there cannot be any doubt that there has been, for some time past, a course recognised in Scotland in conformity with the decision in this case. But when those cases are examined, it does not appear that there has been any solemn decision of the Court of Session establishing the law before this case. If the decision had been of much earlier date, and of much more weight, from repeated recognitions by the Court of Session, it might be the duty of this House to correct any important error which the House might find to have led to such a course of adjudication, but, in the present case, the House has not any difficulty to overcome. Independently, therefore, of authority, it remains to be considered what are the merits of the case upon the statutes

The law was laid down by the learned

FINDLATER v. under which the Trustees act. BOOM Trustees judge, that Road Trustees on a public road are liable for any injury Damages for which may happen to passengers, in consequence of the negligence funds.

accident by ob- or improper conduct of labourers, or, surveyors or other persons struction on road. Non-lia- employed by the Trustees, or by the officers of the Trustees, when bility of trust engaged in any operation performed under the authority of the Trus-If this law be inaccurately laid down, the verdict found under this direction and expounding of the law cannot stand. Now, the law, as laid down, would amount to this,—that Road Trustees (that is, the trust-funds under their control, for such is admitted to be the character of the suit) are liable for any injury happening to a passenger, from any improper conduct of any person when engaged in any operation performed under the authority of the Trustees. nion, that the conduct of such persons was not in due execution of the purposes of the Act (for otherwise it would not be improper), constitutes part of the proposition. The result, therefore, of such a rule of law would be, that however improper the conduct of any person employed by the Trustees or their officers, though wholly unauthorised by the Trustees, and though unconnected with their employment, all damage arising from such conduct would be to be compensated out of the funds of the public, in the hands of the Trustees. a proposition which would not be supported by any principle of law regulating the liability of Trustees for the acts of their servants. The Turnpike Acts do not authorise the application of the funds levied under their authority, in order to compensate for damages arising from any improper act of any person whilst employed under the authority of the Trustees. Such an application of the tolls and funds would be a direct violation of the Act. unless it could be shewn to be so clearly the law at the time the Act passed as to justify the supposition that such an application had not been enumerated, because known to be incident to the execution of the trust. But why should the trust-funds be liable? If the thing done be within the power of the Act, the party sustaining any damage from it cannot be entitled to any compensation unless the act itself provides it; for this reason, that upon the supposition, the act creating the damage would be lawful; and if the thing done be not within the power of the Act, either from excluding these powers, or from the manner of doing it, why should the public fund bear the burden of indemnifying the guilty party? Many cases may be supposed, in which the Trustees may be so far actors in the transaction creating the damage as to render them personally liable, but none in which the trustfund ought to be applied in satisfying the party injured. therefore, the rule of law clearly established in England, and nothing in the law of Scotland leading to a contrary course of decision, and, in fact, no decision prior to the cases which have arisen under such Acts of Parliament as those now in question, and the earliest of those cases being in 1820, I cannot hesitate to say, that I think this is a case in which the practice in Scotland has been erroneous, and ought to be set right, and that the interlocutors appealed from should be reversed.

LORD BROUGHAM.—After shewing that there are no decisions

governing the case, his Lordship proceeds—"That, therefore, there Fn is no rule of law recognised and laid down by the Court is not denied. Ross But it may be that some general principle exists extending the lia-Dam bility of persons farther through their agents than the law of Eng-accid land allows that liability here to exist. When we come to examine road. that, however, we find that it is quite otherwise; that the liability bility according to the general principles of Scotch jurisprudence is more funds. restricted than ours, according to our principles of jurisprudence. Such a case as Bush v. Steinman, in the Court of Common Pleas, in the time of very learned judges, and which was a decision that gave perfect satisfaction in Westminister Hall, a decision perfectly consonant to a crowd of other cases—that case of Bush v. Steinman. I take upon me to say, would not have been so decided in Scotland. Some doubt was expressed at the bar, which I met at the time it was thrown out. I have no doubt that if that case had arisen in Scotland, it would not have been decided as it was decided here by the unanimous opinion of the judges, and the unanimous concurrence of the profession." His Lordship states the case (see page 3), and adds—"Consequently the rule was this, that I am liable for what is done by the man whom I employed, nay, for what is done by the person whom he employs—nay more, for what is done by the person whom the other employs, as if I had done it myself, and for this reason, that in effect I employ him to do it. I set the whole in motion, and it was for my benefit, as well as by my orders, it was done."

I am of opinion that neither by the Scotch law, by decided cases. by direct authority varying with the circumstances of the case—nor by general principles applying to the question, which the Court of Session has laid down, can this judgment be sanctioned. Such being my opinion, and entirely agreeing with my noble and learned friend. I hold it to be our duty to set right the practice which has prevailed in Scotland—this not being the only case. It will reverse the decision in the case in question, it will also destroy and abrogate the authority of the previous cases, and which proceed upon the same principle, it will set right the administration of the law, and make it inconsistent with no decision up to the period of 1820, and it will make it consistent with the general principle of Scotch law, and make the Scotch law in this matter, not only consistent with its own general principles with respect to the liability of agents and other persons, but it will make it likewise entirely consistent with the law of England. Judgment of the Court of Session reversed; but without costs.

22d June 1838.—John Lamb, Pursuer, against William Lamb r. Lyon Lyon, Defender.—F. C. xiii., p. 799.

The pursuer was a passenger on a coach belonging to the ender, and driven by Wingate. The coach broke down hout the slighest warning, some part of the machinery

LAMB v. LYON. connected with the wheels having given way. Averments of insufficiency of the coach, and negligence on the part of the proprietor were also made.

The Defence was, that the injury was by accidental overturn of the coach, by the breaking of the linch-pin of the axle, for which he was not in law responsible. He offered to prove that the coach was substantially built, and in good order. Sheriff Alison, altering the decision of his Substitute. gave damages against the defender. Lyon advocated, when the Lord Ordinary altered and assoilzied. He held that when the actual break down of the coach was admitted, the onus generally of establishing that the vehicle was sufficient, in so far as skill and diligence could ascertain it to be sufficient, was truly on the proprietor. That, however, on the other hand, he was not bound absolutely to ensure its sufficiency, or liable either for necessarily latent defects, or mere accidents or disasters. That the true question, in all such cases, is. Whether the overturn was occasioned by negligence? And the owner was, in the first instance, at least bound to prove due care and diligence.

Lamb reclaimed on the merits, and Lyon as to expenses.

LORD JUSTICE-CLERK.—Looking to the nature of the claim, I am free to admit, that the pursuer was entitled to all these feelings in his favour, which are naturally enlisted on the side of one suffering from such an accident. But the difficulty always is, whether there be sufficient grounds for subjecting the party defending, in damages. Now, my opinion proceeds entirely on the proof, and I am clear that what happened was the result of sudden accident; I admit that it is incumbent on the proprietor to prove that the coach was in a sufficient and landworthy state, and also that it must appear that the accident happened from no negligence on his part, or of those employed by him, and I have arrived at the conclusion that no blame was imputable to him. What happened shews that it was accident merely, and not insufficiency, for the coach set out from Paisley in the morning, performed its journey in safety, and it was on the return from Glasgow that it broke down from the effect of an accident, which, from the testimony of several witnesses experienced in coaches, might have been caused by a sudden jerk. Holding then that the land-worthiness of the carriage has been established, I am for adhering, but without expenses.

LORD MEADOWBANK (who was against the judgment on the proof), said—I think there appears to me to be no difference among us as to the law which must regulate this case. It is properly laid down that a coach proprietor does not warrant the safe delivery of passengers, as he does of goods, he does not insure against accident, but he is bound to provide against accident as far as human foresight and

regard for the safety of the passengers can enable him to do. He is LAMB v. LYON. to trust nothing to fortune or good luck. If he or his servant, for Coachaccident. whom he is also bound, see any deficiency or insufficiency, or crack, or anything doubtful or suspicious about the coach, he will be liable for any neglect in not acting upon his knowledge of what he has observed. But if there be nothing observable, I admit as in the English case cited, that for the latent insufficiency he is not responsible. If again he hold out a particular mode of equipment as adding to the security of the coach, he is bound to see that that particular mode is sufficient in all respects. Then we do not differ in opinion that the party demanding damage must prove the cause of The presumption is, if a vehicle broke down, it is from some fault which the owner might have guarded against. It is correctly laid down by Lord Ellenborough, "at all events he would expect a clear land-worthiness in the coach itself to be established. (Israel v. Clark, 4 Esp. 259). That is the law undoubtedly. when an accident happens, the onus falls not on the party receiving the injury, for the presumption is, that there is a defect, and the law requires, as a duty to the public, that the owner shall prove that all that human skill can do, was done to prevent an accident, for which, if it be casus fortuitus, he is not responsible."

LORD MEDWYN.—Agreed with the Lord Justice Clerk, and Lord Glenlee—Linch-pins will break from unforeseen and blameless accidents, and in spite of every precaution. It is, however, clear from the evidence, that the blame was not in law imputable to Lyon. I do not differ much from Lord Meadowbank upon the general prin-I think the owner must shew that there was a good coach, and that it was in a workable and sufficient state, so far as the human eve could discern. The history of the coach is contained in the evidence of the witness Campbell, and it appeared that the coach was overhauled about a month before. Now the gravamen in Lord Meadowbank's opinion is the putting on a wheel that had been used upon another coach. But the using of it before shews that it must have been a good wheel, and although a spare wheel, it is found that it fitted equally well with the rest. It is said that it required more grease than the others. But the frequency of the greasing should rather have tended to prevent the accident, as it admitted and required of the linch-pin being examined every day.

13th February 1839.—DAVID SWORD, Pursuer, against Sword v. CAMERON and GELLATLY, Defenders.—17 D.B.M., p. 493.

GELLATI.Y. Injury from the careless blast-

The pursuer was one of several workmen employed by ing of rock. the defenders, the tenants of the Quarry of Huntingtower. He had been working about a crane at a distance of about twenty-five yards from where other of the workmen were blasting a portion of the rock. It was the practice before

firing a shot to give the order to "hap the crane." or cover Injury from the explosion. ing of rock.

CAMERON and it up, so that it might be protected from the effects of the But after the crane was "happed" it was still the duty of those employed about it to continue working in its vicinity, removing the shivers of those stones which had been dressed, &c., and not to move off until the signal was given by the call "fire," which was the warning to escape. This signal was sometimes given twice or thrice, sometimes The interval was various which elapsed between the "happing" of the crane and giving the word "fire." sometimes only a few minutes, and sometimes much longer. On the occasion in question, the order was given to "hap the crane," and it was happed, by which the pursuer, and those along with him were certiorated that a shot was soon Two of the pursuer's fellow-workmen then moved off from the crane, the pursuer remained behind working near the crane as was customary, and was his duty. The shot when charged was covered with two or three "long lintel stones" and nothing else. Several of the witnesses thought that a covering of whins, divots, &c., would have been safer, or at least, that a covering of more weight and solidity should have been employed. After the lapse of a space of from one to three minutes after happing the crane, the signal "fire" was given, and distinctly heard by The pursuer and all the others instantly all the men. moved off smartly, at least as rapidly as usual on such occasions, none of them lingered, and some of them kept run-The pursuer was in the middle of about half a dozen of the workman when he was struck on the right leg by an exploded stone about the size of a man's head,—and in consequence of which, the leg had to be amoutated. suer was then at the distance of about seventy vards from the shot measured along the road, or in a straight line about The man who fired the shot was about nine yards behind the pursuer at the time he was struck. ral of the stones flew over the heads of the party among whom the pursuer was. The pursuer and the men had moved off on this occasion in the same manner as was usual at the Quarry when shots were to be fired. The time between the signal and when the pursuer was struck appeared also to have been about the usual time, from two to three minutes.

and it frequently occurred that stones from the shot flew Sword v. over the heads of the retreating workmen.

GRILLATT.V. Injury from the

The pursuer pled that he was injured through the cul-careless blastpable negligence or rashness of the defenders' workman ing of rock. who fired the shot, as he did not "hap" or smother the shot with sufficient care, nor give long enough warning before the explosion: and that the defenders were liable in damages.

The defenders maintained, that the pursuer being a workman at the Quarry, knew the usual practice, and the same warning was given on this occasion as was usual. did not move off so fast as he might have done, and if he had, in all probability no accident would have occurred to him. The injury was consequently in part, if not altogether. caused by his own carelessness, and he alone must bear the consequences.

- -The Sheriff sustained the defence, and the pursuer advo-The Lord Ordinary (Cockburn), altered as follows: Finds, in point of fact, that the operation of blasting 'the rock referred to in the summons, was conducted by 'the defenders' servants without due precaution, and ' that it was in consequence of this that the pursuer was 'struck and lost his leg: Finds, in point of law, that in these 'circumstances, the defenders being the employers of those 'whose rashness in their (the defenders) work produced the 'injury, are liable in damages to the pursuer, therefore sus-' tains the reasons of advocation, advocates the cause, and
- ' decerns in terms of the conclusions of the libel, &c.' The defenders reclaimed, but the Court adhered.

LORD GILLIES.—The interlocutor of the Sheriff was put upon grounds which were plausible in themselves, and ably stated, but I have formed a clear opinion that the interlocutor of the Lord Ordinary is right. In his Lordship's note it is observed that, 'it is not 'improbable, that in general, the operation is conducted with 'culpable negligence at all quarries.' In that remark I entirely To all the quarries where I have had any opportunities of personal observation, I think the remark would be applicable. In the Quarry of Huntingtower, where the accident occurred, the proof appears to me to be complete that there was most culpable negligence, not only on the occasion when this accident occurred, but generally and habitually. The usual notice between the word "fire" and the explosion was so short as to expose all the workmen to the ing of rock.

CAMERON and what time was that? It appears that six or seven of the workmen Injury from the who moved off instantly on the signal "fire" being given, and who careless blast had made no lingering, but were pursuing their escape from the blast. were all of them within the range of the shot. Is that to be tolerated. because it was the usual practice of the quarry? The fact of its being the inveterate practice then affords just the stronger reason for effectually checking it. In regard to what is termed the "happing" of the crane, it is proved that even after that is done, it is the duty of the workmen to employ themselves in removing shivers of stones which had been dressed or otherwise, and not to commence making their escape until the signal "fire" was given. The pursuer employed himself in that manner, and was so engaged according to the practice of the quarry when "fire" was called out. That signal was no doubt distinctly given, and was heard by all the men, including the pursuer, all of whom instantly moved smartly off, according to their ordinary practice. But the shot carried a shower of stones over their heads, exposing them all to the risk of being wounded. that is apparent from the evidence, and the pursuer seeks reparation for a serious injury sustained by him in consequence of that culpable negligence or rashness of the defenders' workmen. I cannot allow the defenders to set up a defence, that they and their workmen are in the practice of exploding, so as to endanger the lives of all concerned.

LORD MACKENZIE.—After stating the facts proved, his Lordship said, 'That being the case, I do not see any ground left for support-'ing the interlocutor of the Sheriff, who points at the pursuer not 'having used sufficient expedition to escape, unless it be thought ' that the maxim could apply volenti non fit injuria. The English of ' that would just be, that if the pursuer wished to be killed, why let ' him be so. But I am afraid that will hardly do. Suppose that the pursuer had walked up to the blast and sat down on the top of the charge, it could scarcely be pleaded that Duff was entitled then to ' fire the shot, and say that if the pursuer wished to be blown up he 'should be indulged. But in truth, when the misapplication of the 'rule volenti non fit injuria is corrected, there is nothing left in sup-'port of the Sheriff's interlocutor, and the judgment of the Lord 'Ordinary must be affirmed.'

Sons r. Incor-PORATION OF TAILORS OF POTTERROW. Non-liability of landlord for

WESTON and 10th July 1839.—Weston and Sons against Incorpora-TION OF TAILORS OF POTTERROW, and Others.—F. C. 14. p. 1232.

The pursuers occupied a shop as booksellers on the fault or negligence of tenant ground-floor of a tenement in Lothian Street, Edinburgh. The defenders were proprietors of the flat above, and John Pettit was their tenant. The water from the water-closet

of the upper flat overflowed, and came through the ceiling Weston and Sons v. Incorof the pursuers' shop on two occasions, causing damage to FORATION OF their stock; and for the injury thus occasioned, they raised POTTERBOW. this action against the landlord and tenant, conjunctly and Non-liability of landlord for severally. At the trial, Lord Meadowbank, in charging the fault or neglijury, directed, in point of law, that 'in all cases of this gence of tenant. 'sort within the city of Edinburgh, proprietors of upper 'tenements must be liable for any such damage arising ' from the act of their tenant, as is now in issue, as a party ' for whom they are responsible, and who must be taken as 'acting for their behoof.' He stated that one had no right to expose his neighbour to hazard through the medium of another, for which he may not from that individual be able to get redress, and he must therefore himself be responsible; and continued:—'I therefore lay it down as law. ' that if anything has been done whereby damage has been · 'created to the possessor of the inferior tenement through ' the fault or negligence of the tenant of the upper, it must ' be held that it was done by him acting for behoof of the ' proprietors of the latter, under implied authority from them; in fact, he was placed there as their representative. ' and it must be held that the act was done for their behoof.'

The jury found for the pursuers, but the Incorporation of Tailors having excepted to the charge of the judge, the point was argued before the Court; and the exceptions having been allowed, the verdict was set aside, and the landlord assoilzied.

LORD MEDWYN.—Entertaining a difficulty, from the very first, about concurring in this view of the law, I thought that, considering the very general occupation of property in this country by tenants, there could be no doubt that, if our law held the landlord responsible for the act of his tenant, it must figure most prominently in our law-books; and accordingly, I examined our legal authoriities, but without finding any support for such a view of the consequences of the relation between landlord and tenant. No such doctrine is laid down in any of our institutional writers, nor in the treatises of Mr. Bell or Mr. Hunter on this subject. The general rule of law is, that culpa tenet suos auctores; and if wrong has been done by a tenant put into possession, in the ordinary administration of the property, and to take the proper use of the subject, and if injury has been suffered by another through the tenant, I do not find it anywhere said that the landlord must be responsible, even

Non-liability of landlord for

WESTON and along with his tenant; still less previously, or solely liable, unless Sons v. Incor-it can be shewn that he was participant in the wrong, by giving the PORATION OF Subject for the very use which has been made of it, and for which POTTERROW. use the rent he receives is paid to him.

Again.—When a proprietor lets his house or land to a tenant. or mandiord for negli-with the view that he shall use or enjoy it without injury to his gence of tenant neighbour, which he will do if the ordinary care is taken. why should the landlord, and not the tenant, be answerable for the want of care on the part of the tenant? Take the case of a tenant allowing his cattle to stray over his neighbour's land. He does the wrong: his landlord did not mean him to do it, and he need not have done it: why should not be himself repair the mischief? Accordingly, I never understood that for this the landlord could be convened. This is one of the most common cases in which one may suffer from the negligence of a tenant. Accordingly, the tenant is alone held responsible; the obligation to keep the fences in repair is laid upon him; and to make his responsibility more effectual, our

> statutory law gives peculiar remedies against him and his cattle. The law of England on this subject is the same. It is the occupier who alone is liable, unless the landlord has covenanted with him to

repair the fence.—(Chitty's Prac., i. 383.)

Again,—I am of opinion that the law has not been correctly laid down in this part of the charge. This, however, if followed by the jury, sufficiently warrants the verdict; and it seems unnecessary to go farther, and consider what is laid down as to the construction of the water-closet as an independent ground of the liability of the landlord. If it be faulty, and damage necessarily and immediately arose from it, I have no doubt that the landlord would be liable, certainly in relief to the tenant, perhaps directly to the party injured—a point he would not probably struggle; but if the construc-tion was usual in houses of that description, if it had been put up for many years without going wrong, and then by an overflow of water in consequence of the tenant, or some one in his house, not observing that, when the handle was pushed down, the water did not cease to flow from the jambing of the wire not allowing the valve of the cistern to shut—a fault easily and immediately cured by shaking the wire—I have great hesitation in thinking that this would come under the rule, which would make a landlord responsible for a faulty construction, even although another construction might have prevented it. The charge as to the responsibility of the tenant for damage arising from his act, is unexceptionable, had it not concluded with holding both parties liable for the accident by the jambing of the wire, and that the responsibility of the tenant would be better considered in the question of mutual relief between This evidently made the jury waive the question the two parties. of the responsibility of the tenant, leaving the landlord to seek his relief against him.

LORD JUSTICE CLERK.—I have considered this case and looked into the authorities, as to which I have been very much anticipated by the remarks which have been now made. This case was prepared,

and the issues adjusted on the principle of including both landlord Weston and and the issues adjusted on the principle of including both landford waster and and tenant, so that it should be ascertained on whom the responsiPORATION OF bility should lie. The issues are in the same phraseology with reTailors of gard to both defenders. Now it appears to me, that though there POTTERROW. are parts of this charge (which is fully given), that are sound, yet as of landlord for to the proposition contained in the first part of it, as read by Lord fault or negli-Medwyn, and also as to the concluding portion of the charge, the general tenants objections taken to it must be sustained; for keeping in view the nature of the action and the issues, it would have been unnecessary to put them alternately, if the law, as expounded in these parts of the charge, is the law of the case. But the very putting of them shews that it would have been necessary to prove, before a verdict could be obtained against the Incorporation, that the damage was occasioned by them, or others acting for their behoof. Now to hold with reference to such a tenement, that the owner, whether he reside in Edinburgh or not, is liable for any damage arising from the acts of his tenant, and that it is of no consequence whether it is wilful and malicious, or from the negligent or unskilful use of the subject let. if the landlord is to be liable, without taking the tenant into view. and the pursuers are not bound to look to the tenant at all. I have some difficulty in being able to discover a principle to entitle us to concur in that part of the charge. I cannot agree in thinking that this erection carries nuisance on the face of it. If it is constructed in the ordinary manner, and not so as necessarily, or in extreme probability, to occasion damage from its ordinary use, there is no farther liability on the landlord. But if by neglect, or by what does sometimes occur, viz., mischievous practices on the part of the tenant, or of his family, damage does occur, it is not the landlord but the tenant who is liable. To suppose that the landlord undertakes for the faithful use of this apparatus, I can find no principle of law When we are considering the liability of the landlord. we are to look at the lease, whether the subject is let in the ordinary way, and with the ordinary circumstances. If it be a nuisance in itself, or so as it may become a nuisance; then according to the dicta of the English law, the landlord is liable, but not when it merely becomes a nuisance from the tenant's fault. If this be the rule in England, it has been also followed here.

His Lordship, after referring to other parts of the charge as affecting the tenant, thus concludes :- I may just mention the charge 'that I would have given as to the law applicable to these issues. 'I think that it would have been correctly stated, that if the jury 'were satisfied on the evidence that the landlord had been guilty of 'any fault or negligence, either by himself or by any one employed by 'him, from which damage had arisen, he would be liable, or if the 'closet had been so constructed as necessarily, or by strong proba-'bility, to lead to damage; but if it had been made in the usual way, 'so as not to lead to damage except from the ignorance, or the un-'skilful or mischievous conduct of the tenant, the landlord would not 'be liable, and the case should have gone to the jury on the whole 'evidence as to the wire and the pincers, and that the pursuers had 'proved such an instrument to have been in the possession of Pettit.

AINSLIE v. STEWART.
Road Trustees not liable for damage occasioned by improper acts of officials.

19th Nov. 1839.—AINSLIE, Advocator, against Stewart, Pursuer.—12 Jurist, p. 178.

Stewart claimed damages against the Trustees of the Deanburn Turnpike Road Trust, for injuries sustained, in consequence of his horse taking fright at a pool of water covering the bend of the road on which he was driving with his horse and gig. He alleged that the trustees, or those for whom they were responsible, had improperly allowed the water to accumulate on the road from a watering stone situated at the side, and by their gross fault and negligence in not having erected a proper fence at the spot in question. Various grounds of defence were taken. That it was the pursuer's fault. That the trustees were not bound to fence off the road, and even if they were to blame, neither at common law nor on the statute, were the trust funds liable for the dereliction of duty, or the contravention of the sta-The Sheriff, after evidence, decerned tute by the trustees. against the defenders and an advocation was brought by The Lord Ordinary, on the facts of the case, adhered to the judgment of the Sheriff, adding as to the liability of the trust funds for such damages, that whatever his own opinion might be, he considered himself bound by the recent and solemn decision of the Court in the case of Findlater against Duncan (1838). The defenders reclaimed, and the Court delayed advising, till the issue of the appeal in Findlater's case to the House of Lords then set out for hear-On the reversal of that case being reported, the Court recalled the Lord Ordinary's judgment, and assoilzied the defenders, but without expenses.

GORDON v. DAVIE.

Road Trust not liable for injuries caused by negligence of servants.

14th Dec. 1839.—George Gordon against William Davie, 12 Jurist, p. 243.

This was a case of a similar nature, and had been disposed of by the Outer House in favour of the pursuer, but the Court, in respect of Findlater's reversal, sustained the defence, but also without expenses.

Exchequer Pleas, 1840.—QUARMAN against BURNETT and BURNETT Another.—Mees and Wels. 6, p. 499.

Damage by col-lision. Master and servant.

This was an action for damage by the plaintiff whose who liable? carriage was injured, and himself hurt by the negligence and want of proper caution and improper conduct of the It was alleged that the horses in defendant's carriage started off with the carriage, without a driver or other person to manage, govern, or direct them; whereby it ran against the plaintiff's carriage, and caused the damage.

In defence, the declaration was denied; and, 2d, alleged that the horses and carriage were not under the care of the defendants, who were elderly ladies residing in Lambeth, and who kept a carriage of their own, but who hired horses and a coachman from a job-mistress of the name of Mortlock. They generally had the same horses, and always the same coachman, named Kemp, (the only regular coachman in Miss Mortlock's employ,) to whom they paid 2s. for each drive. He received regular wages from Miss Mortlock. The defendants sometimes took the horses and their coachman into the country for several weeks, and they paid him a certain sum per week. They had a plain coachman's coat and a livery hat, for which Kemp was measured, and which he wore when driving the defendants. and took off on his return to their house, where the coat On 21st December and hat were hung up in the passage. 1838, he went into defendants' house to take off the hat. (he had not on the coat that day,) and left no one in charge They started off, and ran against plaintiff's of the horses. chaise, which was drawn up on the side of the footpath, threw him out, and seriously injured him, besides damaging the chaise.

In these circumstances, it was contended that Kemp was the servant, not of the defendants, but of the job-mistress, and the defendants were not responsible. The judge thought that there was evidence to go to the jury, but gave the defendants' counsel leave to move to enter a nonsuit. The plaintiff now maintained dict for plaintiff, L.198, 9s. The only question was, whether that the verdict was good. the carriage and horses could be said to be in the care of QUARMAN v. the defendants, in the sense imputed by the declaration.

BURNETT, &c.
Damage by col. The important case on this subject is that of Laugher v.

lision. Master Pointer, (5, B. and C. 547,) in which the judges of the

Court of King's Bench were equally divided—Lords Tenterden and Littledale being against liability, while J. Bayley and Holroyd were for it.

The present case was distinguishable from it, and falls within the exception stated by the judges—there was there no contract with the coachman. In the present case, the defendants exercised a selection of this coachman, and supplied him with livery, which he was changing when the accident occurred. The coachman is, in point of law, the servant of the hirer.

The defendants maintained that there was no distinction between this and Laugher's case. Kemp was in the employment of Mortlock for this particular duty.

PARKE, B.—After stating that the Court were of opinion the circumstances of the case did not seem to make any difference between it and the case of Laugher, proceeded:—It is undoubtedly true that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner which occasions the damage complained of, or to absent himself at one particular moment, and the like. As to the supposed choice of a particular servant, my brother Maule thought there was some evidence to go to the jury of the horses being under the defendants' care, in respect of their choosing this particular coachman. We feel a difficulty in saying that there was any evidence of choice, for the servant was the only regular coachman of the job-mistress' yard. When he was not at home, the defendants had occasionally been driven by another man, and it did not appear that, at any time since they had their own carriage, the regular coachman was engaged, and they had refused to be driven by another; and the circumstance of their having a livery for which he was measured. is at once explained by the fact, that he was the only servant of Miss Mortlock ever likely to drive them. Without, however, pronouncing any opinion upon a point of so much nicety, and so little defined as the question, whether there is some evidence to go to a jury of any fact, it seems to us that if the defendants had asked for this particular servant amongst many, and refused to be driven by any other. they would not have been responsible for his acts and neglects. indeed, the defendants had insisted upon the horses being driven. not by one of the regular servants, but by a stranger to the jobmaster appointed by themselves, it would have made all the differ- QUARMAN II. ence. Nor do we think there is any distinction in the case occasioned Burnert, &c. by the fact that the coachman went into the house to leave his hat, lision. Master and might therefore be considered as acting by their directions, and and servant in their service. There is no evidence of any special order in this case, or of any general order to do so at all times, without leaving any one at the horses' heads.

We are here compelled to decide upon the question left unsettled by the case of Laugher v. Pointer, in which were able judgments on both sides. We think the weight of authority and legal principle is in favour of the view taken by Lord Tenterden, and Mr. Justice Littledale.

The immediate cause of the injury is the personal neglect of the coachman in leaving the horses, which were at the time in his imme-The question of law is, whether any one but the coachman is liable to the party injured, for the coachman certainly is.

Upon the principle that qui facit per alium facit per se, the master is responsible for the acts of his servant, and that person is undoubtedly liable who stood in the situation of master to the wrong-doer,—he who had selected him as a servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey: and whether such servant has been appointed by the master directly. or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference.

But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable. on the simple ground that the servant is the servant of another, and his act the act of another. Consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle,—namely, that a person is liable not only for the act of his own servant, but for any injury which arises by the act of another person in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief-Justice Eyre says, in the case of Bush v. Steinman, and cannot be maintained in its full extent without overturning some decisions, and producing consequences which would, as Lord Tenterden observed, 'shock the common ' sense of all men.' Not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of the vehicles if they had the management of them, or their servants if they were managed by servants, but the purchaser of an article at a shop which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness while passing along the street. It is true that there are cases—for instance, that of Bush v. Steinman, Sly v. Edgly, (6, Esp. 6), and others—and perhaps amongst them may be classed

and servant.

QUARMAN v. the recent cases of Randelson v. Murray, in which the occupiers of Burnery, &c. land or buildings have been held responsible for the acts of others Damage by collision. Master than their servants done upon, or near, or in respect of their prolision. perty. But these cases are well distinguished by my brother Littledale in his very able judgment in Laugher v. Pointer. The rule of law may be, that where a man is in possession of fixed property. he must take care that his property is so used or managed that other persons are not injured, and that whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are of the nature of nuisances; but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to personal moveable chattels, which, in the ordinary conduct of the affairs of life, are entrusted to the care and management of others who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods for any persons who choose to entrust them. It is unnecessary to repeat at length the reasons given by J. Littledale for this distinction, which appears to us to be quite satisfactory; and the general proposition above referred to, upon which only the defendants can be made liable for the acts of persons who are not their servants, seems to us to be untenable. We are therefore of opinion that the defendants are not liable in this case.—Judgment accordingly.

MILLIGAN v. WEDGE. Damages through careless driving of cattle. Owner his servant.

18th November 1840.—Queen's Bench.—MILLIGAN against WEDGE.—12 Adol, and Ellis, p. 737.

The plaintiff had a show-room, &c., adjoining a public not liable for acts of a licens-street, and had marble chimney-pieces, &c., exposed for sale ed drover or in the room. A bullock belonging to the defendant, and, as alleged, being driven by his servant in his behalf carelessly and negligently; and by reason of the careless, negligent, and improper conduct of the defendant by his said servant, ran into the show-room, and broke five chimney-In defence, it was pled that the person driving the bullock was not employed by the defendant as his servant.

> It appeared that the defendant was a butcher, and that on the day in question he had bought a bullock in Smith-By the bye-laws of the city of London, no field market. person not licensed can drive cattle for hire from Smithfield, though the owner may drive them himself. fendant employed a licensed drover to drive the bullock

to the defendant's slaughter-house, which is within the city. MILLIGAN v. The drover employed a boy to drive it to the slaughter-Damages house, together with four other bullocks, which were not through caredefendant's property, but were to be driven in the same cattle. Owner not liable for direction as his bullock. As the boy was driving the acts of a licensed bullock by plaintiff's show-room within the city, the de-driver or his fendant's bullock did the mischief complained of judge at the trial was of opinion that the boy was not the defendant's servant, and the jury having found neglect, a verdict was given for the defendant on the first plea; with leave to move to enter a verdict for the plaintiff.

At the hearing, on a rule obtained.—

LORD DENMAN.—I think we are bound by the late decision. Quarman v. Burnett, which was pronounced after full consideration. It may be another question, whether I should agree in all the remarks delivered from the bench in that case. If I felt any doubt. it would be, whether the distinction as to the law in the cases of fixed and of moveable property, can be relied on. The doctrine of my brother Littledale, in Laugher v. Pointer, is applicable here. The party sued has not done the act complained of, but has employed another, who is recognised by the law as exercising a distinct calling. The butcher was not bound to drive the beast to the slaughter-house himself: he might not know how to drive it. He employs a drover. who employs a servant, who does the mischief. The drover, therefore, is liable, and not the owner of the beast. I may remark that one might, perhaps, be reconciled to the distinction between cases of fixed and of moveable property, by considering that, to hold the owner of land or building liable for injury done in respect of that property, will enable the party injured to know more readily from whom he is to seek redress. In Randelson v. Murray, the work was in effect done by the defendant himself at his own warehouse; if he chose, instead of keeping a porter, to hire one by the day, he did not thereby cease to be liable for injury done by the porter while under his control; so as to the decisions upon the Pilot Act—when it is not necessary to employ a pilot, the master, who has voluntarily employed one, is liable for his act. Here it does not appear that the defendant attended the drover or his servant, and the mischief was done, not in the course of the butcher's business, but of the drover's.

WILLIAMS, J.—The difficulty always is, to say whose servant the person is who does the injury—when you decide that the question is solved. To say that that party is liable from whom the act ultimately originates, is, indeed, a rule of great generality, and one which will solve the greater number of questions; but its applicability fails in one case. For when the person who does the injury exercises an independent employment, the party employing him is clearly not

MILLIAM v. liable. I agree in the decision in Randelson v. Murray, for the warehouseman's servant, whether daily or weekly, is equally under the
through care-control of the warehouseman; and that is the way in which Mr.
less driving of Justice Storey puts this point—he brings it to the question, Who
employed the person that did the injury? The butcher here, whom
we cannot assume to be acquainted with driving, deputes a person
to drive who understands the business, and whose servant is guilty
of the negligence that produces the injury. That person, therefore,
is the party liable.

Coleringe, J.—The true test is, to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master and servant exists between them, the act of the one creates no liability in the other. Apply that here. I make no distinction between the licensed drover and the boy. Suppose the drover to have committed the injury himself. The thing done is in the driving. The owner makes a contract with the drover that he shall drive the beast, and have it under his charge, and then the drover does the act. The relation of master and servant does not, therefore, exist between them.

RAPSON v. CUBITT. Contractor not liable for negligent acts of a sub-contractor or his workmen.

Exchequer Pleas. 28th April 1842.—RAPSON against CUBITT.—Mees. and Wels., 9, p. 710.

The plaintiff was butler, and his wife housekeeper, of the Clarence Club; and the defendant was employed by the committee to make certain improvements and alterations on the Club-house, in the course of which he had to employ a sub-contractor for the gas-fittings. It was alleged that, in consequence of the gross negligence of the gas-fitter, an explosion took place, which injured the plaintiff and his wife, and he claimed damages from defendant.

The defendant objected to liability for the negligent acts of the sub-contractor for the gas-fittings. The Lord Chief Baron, at the trial, directed the jury to consider whether the injury occurred through the negligence of the defendant, or any person employed by him; and the jury found a verdict for the plaintiff, damages L.500—leave being reserved to the defendant to enter a nonsuit.

LORD ABINGER.—The rule must be absolute to enter a nonsuit. The injury was occasioned by the negligence of Bland, who did not stand in the relation of servant to the defendant, but was merely a sub-contractor with him, and to him the plaintiff must look for redress. I think the true principle of law, consistent with common



sense, was laid down in the case of Quarman v. Burnett, in which all the previous cases on the subject were cited and considered, and Contractor no some overruled. I have always been of the same opinion, and there-liable for negli fore see no reason for departing from that decision.

gent acts of

PARKE, B.—I am of the same opinion. The plaintiff has his re-or his work medy against Bland, whose negligence was the cause of the injury men. If he attempts to go farther, and to fix on the defendant, it can only be on the ground of Bland's being the servant of the defendant; but then the obvious answer is, that Bland was only a sub-contractor to do certain of the work, and that the relation of master and servant did not subsist between him and the defendant. The true rule on this subject was laid down by this Court, in the case of Quarman v. Burnett, which is directly in point, and cannot be distinguished from the present case. The Court there said :- 'The liabi-Lity, by virtue of the principle of the relation of master and servant. ceases when the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another. Consequently, a third person entering into a contract with the master, which does not raise the relation of master and ' servant at all, is not thereby rendered liable.' The case has been approved of by the Court of Queen's Bench in Milligan v. Wedge: and Lord Denman there said: 'In Randelson v. Murray, the work to be done was necessary work done on the premises. The owner 'would have been liable if he had used his own servants and his 'own tackle; by hiring a porter and his tackle for a day he could not exempt himself from that liability.' Lord Denman there seems to adopt the distinction which this Court, in Quarman v. Burnett, said ought to be taken. If a man has anything to do on his own premises, he must take care to injure no man in the mode of constructing the work. Whether he injures a passenger on the street, or a servant employed about his own work, seems to make no differ-I think, therefore, that as Bland was a sub-contractor, and not the servant of the defendant, the latter is not liable, and the rule of nonsuit made absolute.

14th March 1842.—Robert Hislop, &c., against Sir P. C. Hislop, &c. v Durham. DURHAM.—D. vol. xx., p. 1168. Liability on proprietor of old coal-pit

On the night of 7th May 1841, Elizabeth Hislop, a young for injury. woman who lived with her father, a workman at the paper mill near Lasswade, fell into an old coal-pit, and was killed. The night was dark, and she had been in a public house with her brother and two female acquaintances—she was sick in the house from the effects of the liquor, and on leaving the house leant on the arm of one of the other women.

DURHAM. Liability on proprietor of old coal-pit for injury.

HISLOP, &c. v. In returning home they wished her to go one way, but she ran along the road in an opposite direction. They ran after her, but it being dark lost sight of her. The coal-pit in which her body was afterwards found was not on the line of the road from the place where she left her friends, to her father's house. To get at it she must have turned off at right angles along a private road leading to a farm house. but just at the spot where the coal-pit was situated a path again turned in the direction of her father's house, by which she might have regained the highway.

> From the pursuer's evidence it appeared that the fencing of the pit was insecure, the cradle which had covered it being quite rotten. The deceased was industrious and skilful, and besides serving at home, she made about 6s. a-week at the paper mill.

> The action was by the father for damage for the loss of his daughter, and also by the brother and sisters for solatium.

> The defence was, that sufficient precautions had been taken to free him from liability. That it was not necessary absolutely to exclude the possibility in any one recklessly or designedly getting into the pit, especially as no stranger could be at the place, except by what was at the best a tolerated trespass. To create a claim for reparation, there must be what there could not have here been, the exercise of ordinary care and attention on the part of the sufferer.

> LORD PRESIDENT.—This case is of importance not merely to the parties, but also to the law. It is admitted that the defender is the proprietor of the lands on which the coal-pit is situated, where the deceased's body was found, and the question is put, whether the defender wrongfully failed to have it properly secured, and whether in consequence of that failure the deceased fell accidentally in, and lost her life. As to the rule of law applicable to a case of this nature, there can be no doubt. It is clearly laid down in the institutional writers, and is evinced in the cases referred to by the pursuer, in none more clearly than that of Black. There you have the elements that enter deeply into the present case, for not only was there a fence, but one which had originally been ample. I have no occasion to call in question the doctrine which the defender has supported from the English cases, that there must be due caution on the part of the sufferer, and that it is not necessary to furnish what will protect even the unreasonable or absurdly reckless. The doctrine does not inter-

fere with the case of Black. The words of the issue properly de-Histor, &c. v. fere with the case of Black. The words of the issue properly describe the fencing required, viz., 'whether the defender wrongfully Liability on failed to have the said coal-pit properly secured or protected, and proprietor of that in consequence of the said failure the said Elizabeth Hislop fell old coal-pit for injury. 'accidentally in it.'

You will also consider what effect in the defender's favour the circumstance should have that the deceased was drunk when she left her companions, and that she strayed out of the way in getting to the pit. You will observe that the evidence as to the sufficiency of the fencing is very contradictory. It is for you to discriminate where the truth lies. If you think it has been proved that it was insufficient, and that in consequence the deceased met her death, it is clear in law notwithstanding her being out of her way or drunk, that the defender is liable. On the other hand, if you think the pit has been proved to be so well fenced, that it could only be broken into by violence, you will find for the defender. If you are satisfied that the defender is liable, you will give fair and reasonable damages with reference to what occurred, the injured feelings of the pursuer. and the proved industrious habits of the deceased. But you will also take into consideration the state of the deceased, which, in some measure, led to this dreadful catastrophe.

Verdict for pursuer, Robert Hislop, damages £300.

16th July 1842.—THE NEW CLYDE SHIPPING COMPANY, NEW CLYDE Pursuers, against THE RIVER CLYDE TRUSTEES, Defen Shipping Co. r. RIVER CLYDE ders.-14 Jurist, p. 586.

TRUSTEES. Non-liability of the trust funds

The Shipping Company claimed damages against the River for improper acts of servants. Clyde Trustees, to the extent of £196, 16s. 4d., as loss sustained by the 'listing' of their steamer 'Albert' in the harbour at the Broomielaw, caused by the alleged improper operations of the defenders by a partial dredging of the river, and by the omission, or fault of the Harbour Master in not ordering the necessary operations for removing the threatened danger, although required so to do. The case came by advocation from a judgment of the Sheriff, assoilzieing the defenders in respect of the case of Findlater, which occurred during the dependance. The Lord Ordinary (Cuninghame). pronounced the following interlocutor:— 20th May 1842.

- -Having resumed consideration of this advocation, with
- ' the revised cases, proof in the inferior court, and whole pro-
- 'cess: Finds, 'that the advocators under their libel in the
- ' inferior court claim damages from the respondents, the Par-

Non-liability servants.

New CLYDE ' liamentary Trustees, for improving the navigation of the Shipping Co.v. river and frith of Clyde, for damages sustained from the ' fault and omission of the defenders' Harbour-Master at the of the Trust' Broomielaw to provide safe harbourage for a vessel of the funds for improper acts of pursuers, in August 1836, which, it is alleged, was placed 'in an unsafe and improper berth by the said Harbour Trus-' tees, whereby she listed, or was upset in the harbour, and 'received damage to the extent of £196 in her cargo and 'hull: Finds, in point of fact, that it is established by the 'proof that the steamboat called the Albert, belonging to 'the pursuers, was moored in a berth of the Broomielaw ' harbour, selected or sanctioned by the Harbour-Master, or other servant of the defenders, and that she had then a ' full cargo on board: Finds it proved that the damage in ' question arose from the unskilful and improper operations 'followed by the servants or workmen employed by the ' defenders in deepening the solum of the harbour next the ' said berth, whereby the vessel was laid on unequal at low water, and was exposed to be wholly or partially laid over on the return of the tide: Finds it proved, that from that ' cause the pursuers sustained damage, at the date libelled on, to the amount concluded for in the libel; but finds it 'not proved that that damage was, in any respect, caused 'by any personal misfeasance or culpa on the part of the 'defenders: Finds, in point of law, that the said proof is 'not sufficient to establish a claim against the defenders, or the trust funds in their hands, which they are bound ' to appropriate in terms of the statutes under which they 'act, and in no other way: On these grounds approves of ' the interlocutor of the Sheriff-depute on the merits, but 'finds that, from the state of the law as understood and 'acted on in Scotland, under decisions of this Court in analogous cases, for years previous to the institution of ' the present action, and down till the decision of the House of Lords in the case of Findlater, which was not pro-'nounced till this process was in an advanced stage, it is 'not reasonable or just to subject the pursuers in expenses.' Note.—'When the advocation came to be discussed be-' fore the Lord Ordinary, it was stated by the advocators 'that there were peculiarities sufficient to distinguish the

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'present case from that of Findlater; and as this question New Clyde Shipping Co.v.
'has been before this Court since the decision in that case, River Clyde in which the principles of that judgment, and the extent Trustress. Non-liability to which it falls to be applied, fell to be considered, the for negligence of servants.

'Lord Ordinary allowed parties to state their argument in cases. On considering the argument in these papers, however, he has not been able to satisfy himself that there are any grounds for giving a different determination in the present case from that which was decreed by the Court of last resort, in the case of Duncan v. Findlater.

'In the present case, as in Findlater's case, the defenders 'act solely as parliamentary trustees over the estate com-' mitted to their charge. That estate is held by them not ' for private interest or profit, but solely for the benefit and ' use of the public. It is not alleged that the defenders per-'sonally were guilty of any wrong, either in the excavation of the harbour, or in the selection of the berth for the pur-' suers' vessel. In both cases the trustees have power to 'name overseers, and the defenders appointed a harbour-'master whose general qualification for the duty is not im-* peached: and in this case, as well as in Findlater's, the * trustees are very strictly limited by the terms of the statute under which they act, in the appropriation of the rates received by them.

'These are circumstances common to both cases. • then, does the present case and that of Findlater differ? The main specialty relied on by the pursuers seems to be, . that their damage is said to have arisen from a failure, on * the part of the defenders, to fulfil the counterpart of the very contract under which the pursuers paid harbour dues, They stated that they paid £2000 annually of such dues to the defenders—that these were given for safe shelter and if their property was negligently so placed by the defenders' servants as to suffer great damage, there was an implied stipulation on the part of the defenders to repair This certainly appears a strong view of the case, the loss. both on legal and equitable principles; but it is doubted if the very same argument was not equally maintainable in Findlater's case. The travellers on a road pay tolls for well-constructed and safe roads; some stage-coaches pay as Non-liability for negligence of servants.

NEW CLYDE ' large a sum of tolls as the pursuers pay here of harbour SHIPPING Co.v. dues; and it is now laid down by authority not to be questioned, that if a coach is overturned when filled with passengers, whose lives are of the greatest value to their families, yet if the injury has arisen from the negligence of 'subordinate persons, whom trustees are authorized to em-' ploy, the sufferers must seek redress only from the wrong-' doers, and not from the trustees or trust funds. ' cases where the funds are appropriated by statute to spe-'cific purposes, and every other application of them pro-' hibited, there is no implied contract which entitles any ' party to attach them for any damage or failure of duty ' committed by subordinate servants. The remedy is against ' the individuals who committed the wrong, and not against ' the trustees.

> 'This seems to be the import of all the cases in English ' practice, which are now held to be equally applicable to our According to the view taken in Findlater's case in ' the House of Lords, it was held that the powers and liabili-' ties of statutory trustees, should in general be the same in ' both ends of the Island, and as it was thought there was 'no practice in Scotland prior to 1820, which recognised the ' right of private parties to sue road trustees for damage not 'authorised or contemplated by any statute, the House of ' Lords held that the responsibility and liability of trustees ' in this country must be governed by the same rules under ' which such trustees act and are protected in other parts of ' the kingdom, subject to the statutes of the same parliament. 'Generally the rule of law seems to be firmly established in 'England, that no action lies against public functionaries ' personally, for acts done by them in a corporate capacity, ' from which detriment happens to the plaintiff, at least not ' without proof of negligence, and from what passed in Find-' later's case in the House of Lords, their Lordships were of 'opinion that there was no authority or practice in Scotland ' to preclude the Court from giving effect to the same prin-'ciples in our law in favour of public trustees, as effectually ' founded on justice and public policy. There was only one ' ground on which it occurred to the Lord Ordinary that a -' plea of feasible relevancy might be set up for the pursuers.

' If it had been made out that the damage was sustained by $_{
m Shipping\,Co.v}^{
m New\,Clyde}$ operations on the bed of the harbour, apparently in the River Curve. Curve of a permanent alteration and improvement of its Non-liability ' construction, as such operations cannot be completed in one for negligence of servants. 'day or week, while in their unfinished state, vessels fre-' quenting the port must be exposed to certain hazards which ' are unavoidable, a question might arise, whether the damage ' could not be claimed as part of the necessary expense of ' improving the harbour. But if that were a legitimate claim ' under this act, it should have been brought in terms of the 'Act 6, George IV., sect. 84, within twelve calendar months 'after the damage or injury were sustained. The action here ' was not brought for nearly two years, and that of itself is ' fatal to any claim as against the trustees. See Lord Oakley 'v. Kensington Canal Company, (5 Barn.: and Ald. 138.) 'Besides, the action is not laid on the ground now indicated. but on the ignorance, or misfeasance of the Harbour Master. ' for which the statutory trustees are now held not to be ' responsible.'

The pursuers reclaimed but the Court adhered.

Nov. 4, 1842.—Davis against Mann.—Mees and Wels, 10, Davis v. Mann.

p. 547.

p. 647.

p. 647.

The plaintiff sought to recover damages for the loss of a donkey, caused, as he alleged, by the careless, negligent, unskilful, and improper conduct of the defendant's servant. who was driving a waggon and horses along the road, and ran the said waggon on the donkey and killed it. It appeared that the plaintiff fettered the fore-feet of the ass, and turned it into a public highway, and at the time of the accident, the ass was grazing on the off-side of the road about eight vards wide, when the defendant's waggon with a team of horses coming down a slight descent, at what was termed a smartish pace, ran against it and knocked it down. proved that the driver of the waggon was some little distance behind the horses. The Judge at the trial told the jury, that though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages travelling on it might be illegal.

Liability of master for negligence of servant.

DAVISO. MANN. still if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the waggon, the action was maintainable against the de-He directed them that, if they thought the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff.

Verdict for plaintiff, damages 40s.

The defendant moved for a new trial, on the ground of He maintained that the principle of law as mis-direction. deducible from the cases, is, that when an accident is the result of faults on both sides, neither party can maintain Here the plaintiff, by fettering the donkey, had prevented him from removing himself out of the way of accident. Had his fore-feet been free, no accident would probably have happened.

LORD ABINGER, C.B.—I am of opinion, that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully on the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might with proper care have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been impro-

perly there.

B. PARKE.—This subject was fully considered by the Court in the case of Bridge v. The Grand Junction Railway Company, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such, as that he could by ordinary care have avoided the consequences of the defendant's negligence. In that case there was a plea importing negligence on both sides, here it is otherwise, and the judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury, and that if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass on the road would not bar the plaintiff of his action. All that is perfectly correct, for although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the properly running against a carriage going on the wrong side of the road.

GURNEY, B., and ROLFE, B., concurred.—Rule refused.

27th January 1844.—Dow, Pursuer, against WILLIAM Brown and Co., Defenders.—16 Jur., p. 248.

Dow v.
Brown & Co.
Damages—
steamboat explosion.

The pursuer's wife had taken a passage on board the steamboat 'Telegraph,' which sailed between Glasgow Greenock, and other places on the Clyde. She was killed by an explosion of the vessel off Helensburgh, on 21st March 1842. The steamer belonged to the defenders. The summons alleged that the 'Telegraph' was, in reference to her frame or build, her fitting up, and whole arrangements. constructed with the view of insuring the greatest possible speed, and with the intention and purpose of competing with the carriages on the Glasgow and Greenock Railway. the boiler and engine weighing only eight tons, being framed in imitation of the locomotive engines employed on railways. and worked on the high pressure principle. That the said explosion, and consequent destruction of the ship and engines, and the death of the said Isabella Keith or Dow. were occasioned by the insufficiency or mal-construction of the said steamboat, or of the engines, boiler, or machinery thereof, or of the materials composing the same, or by the culpable rashness, ignorance, unskilfulness, gross negligence, and misconduct of the owners of the said steamboat, or of those who had charge thereof at the time, under their employment, and for whom they are responsible. That the pursuer had suffered severe injury and loss by the sudden and violent death of his said wife, in his feelings, comfort, and domestic happiness, for which he is legally entitled to reparation from the defenders; and concluded that 'the said defenders ought and should be decerned and ordained, by decree of the Lords of Council and Session, conjunctly and severally, to make payment to the pursuer of the sum of L5000, in name of solatium and reparation to him for the loss and injury There was no conclusion for direct patrimonial It was admitted in defence that the explosion caused the death, but it was denied that the calamity was occasioned either by the construction of the vessel, or that it arose from negligence; but it was said to be the result of Preliminary defences were stated, and, among accident. others, '4. In so far as the summons contained, and was inDow v.
Brown & Co.
Damages—
steamboat explosion.

'tended to enforce a claim of solatium, it was irrelevant, 'and could not be maintained by the pursuer as the husband of the party whose death constituted the ground of action, 'more especially as no animus injuriandi was alleged 'against the defenders.' The Lord Ordinary repelled the preliminary defences, and sustained the relevancy; and the defenders acquiesced, except in so far as referred to the fourth plea. At the calling of the case in the Inner House, the defenders were proceeding to support the plea, when the Court interposed, holding that it was not an open point,—Lord Medwyn observing, that it was raised and discussed in the case of Drummond v. Brown and Children, 26th Feb. 1803, F. C., and other cases. The Court accordingly adhered.

CARPUE v. LONDON & BRIGHTON RAILWAY COY. Negligent management of line and train. Presumption of negligence by accident. Prior notice of action cunder statute.

8th February 1844.—Queen's Bench.—Carpue against The London and Brighton Railway Co.—Railway Cases, (Carrow and Oliver), 3, p. 692.

Ine and train. This was an action against the defendants for damages Presumption of negligence by on account of injuries sustained by the plaintiff, a passenger accident. Prior notice of action on the railway. The train in which the plaintiff was traunder statute. The velling had been thrown off the rails, in consequence, as he alleged, of the want of due skill and care in conveying him, and through negligent conduct in the management of the train.

The defendants were owners and proprietors of the London and Brighton Railway, and of the carriages used for conveyance of passengers on and along the said railway, and certain other railways—viz., the London and Greenwich Railway, and the London and Croydon Railway. The plaintiff took a ticket from London to Brighton on the 2d October 1841, and the declaration proceeded:—'The said 'Company then received the plaintiff as such passenger as 'aforesaid, and therefore it became, and was the duty of 'the said Company, to use due and proper care and skill in, and about carrying and conveying the plaintiff on his 'said journey, but took so little care, and so negligently 'and unskilfully conducted themselves in, and about carry—

'ing and conveying the plaintiff on his said journey, and CARPUE v. in conducting, managing, and directing the carriage in BRIGHTON 'in conducting, managing, and directing the carriage in DEIGHTON which the plaintiff was such passenger as aforesaid, and RAILWAY COY.

Negligent mathe train to which the same was attached, and the engines nagement of line and train. whereby the said train was drawn upon and along the Presumption of ' said Company's said railway: That by reason of such want negligence by accident. Prior of care and skill of the said Company, the carriage which notice of action 'contained the plaintiff was then thrown and cast with 'great violence from and off the rails of the said last-men-'tioned railway, and was then overturned, crushed, and 'broken to pieces, and thereby the plaintiff was thrown 'out of the said carriage with great violence, and was 'grievously bruised, wounded, and injured; and also by 'means of the premises, the plaintiff became sick, sore, 'lame, and disordered, and so remained and continued for 'a long time, to wit hitherto; during all which time the ' plaintiff suffered and underwent great pain, and was hin-'dered and prevented from transacting his necessary and ' lawful affairs by him during all that time to be performed 'and transacted and lost and was deprived of divers great 'gains, and profits, and advantages, which he might and otherwise would have derived and acquired in his pro-'fession of a surgeon; and thereby, also, the plaintiff was ' forced and obliged to, and did then pay and expend divers 'monies, amounting, in the whole, to the sum of £200, in 'and about endeavouring to be cured of the said bruises. 'wounds, and injuries, and hath been and is, by means of 'the premises, otherwise greatly injured and damnified,' &c. The defendants pled—not guilty.

At the trial, before Lord Denman, C. J., at the midsummer sittings, 1842, it appeared that the position of the rails had been somewhat deranged at the place where the injury took place, and that the train was proceeding at a rate which was dangerous, considering the state of the rails. For the defendants it was contended, that by their act they were entitled to twenty days' notice in writing of the action. The Chief Justice reserved leave to move for a non-His Lordship referred to the evidence as to the state of the rails, and told the jury that they must be satisfied that the accident had been occasioned by the negligence of

under statute.

CARPIER D. REGISTON Negligent ma-

under etatute.

the defendants: and that as the exclusive management of the railway and machinery was in their hands, it was to RAILWAY COY. be presumed that the accident arose from their want of care. nagement of unless they gave some explanation of the cause, which the line and train.

Presumption of plaintiff could not be expected to give, not having the same negligence by means of knowledge.

notice of action

The jury found for the plaintiff.—In Hilary term, 1843, Sir W. Follet, Solicitor-General, obtained a rule nisi for a nonsuit, on the ground of the want of notice; or for a new trial for misdirection, in telling the jury that it was for the defendants to disprove negligence, rather than for the plaintiff to prove it.

SIR F. POLLOCK showed cause. The question is, whether the matter complained of is within the 253d section of the Act. The protection claimed here was never intended, but was to be confined to powers in making and maintaining the railway, not to the use by the Company, in common with others, of the road when finished; such a construction would be opposed to the public good. This is an action against the defendants, not as a railway company, but as carriers, for they are mere carriers on the Greenwich and Croydon Railways, on which a part of the journey is performed; and it is impossible that there should be a different rule as to safe carriage on on one part of the journey and on another. If a coach accident occurred from fast driving over a part of a turnpike road which was dangerous from want of repair, it would be no answer to an action against the coach proprietor to say, that the commissioners of the road might be sued, and were entitled to notice of action. The same principle holds here, where the carrying business was improperly conducted with reference to the state of the railway. The Company are responsible as carriers, as they knew, or had means of knowing, that the state of the railway demanded greater care and caution. They are not compelled to become carriers, though they may be compelled to keep the railway in repair for such a purpose; but they may abandon it, when the land will, by sect. 130, revert to the original owner. The contract, therefore—the breach of which is complained of-to carry safely from London to Brighton, is not a thing done in pursuance of this act. In Palmer v. The Grand Junction Railway Company, (2 B. and Ad., 172,) it was held that, under a similar clause, a railway company were not entitled to notice of action against them for misfeazance as carriers. It is true that in that case the damage was to goods of which carriers are insurers; but the only difference is, that in that case negligence is presumed—in the case of passengers, it must be proved; therefore, if negligence be proved against them as carriers, the case is out of the 253d section. The only question is, whether there has been negligence. If not, their defence is under the general issue.

SIR W. FOLLET, and THESIGER.—The question is, whether this

action is brought against the defendants simply on the ground of their being carriers, and not as proprietors of the railway. If they LONDON & unite the characters which their Act empowers them to do, they are RAILWAY COY. liable under circumstances for which another carrier on the line Negligent mawould not be liable, and are therefore entitled to notice of action, nagement of train. even for negligence in carrying. In the course of the case at the Presumption of trial, much evidence was given as to the state of the road, which negligence by was found to have been caused by the derangement of the rails, accident. Prior That was clearly a matter 'omitted to be done' by the Company, as under statute. in Smith v. Shaw, (10 B. and C., 277,) a company having power under a statute to direct the mooring and unmooring of vessels in their dock, were held to be entitled to notice in an action brought against them for giving improper directions. (Pattison, J.—This is not an omission to do a thing, but doing it in a negligent and improper manner. Carrying passengers negligently is not an omission to carry them.) The case of Palmer (4 M. and W., 766) was also referred to. As to abandoning the railway, under sect. 130, while the Company keep it open under the Act, they must keep it in re-(The second objection against the direction of the Chief Justice being that for a new trial, on the ground of misdirection, was abandoned in the argument.)

LORD DENMAN, C. J., delivered the judgment of the Court, (Denman, Patteson, Coleridge, and Wightman). The only question for decision in this case is, whether the defendants were entitled to notice of action under the 253d section of their act.

For the necessity of such notice it was urged that, as the declaration charged the injury done to the plaintiff to have arisen from the Company's omission to perform certain works required by the act of Parliament, the complaint was, in substance, a complaint of some act done, or omitted to be done, under the act, and therefore the action could not be maintained without notice. In support of this argument, the dictum of Parke, B., in Palmer v. The Grand Junction Railway Co., was cited. The notice was not thought in that case to be necessary, but the learned Baron states that, 'if the action was 'founded on neglect in not duly fencing the railway, on account of 'which the travelling on it was dangerous to those passing along it, 'assuming that such an objection resulted from the 180th section. 'or from the general provisions of the act, that case would have 'fallen within the 214th section, (the section requiring notice). 'But when the matter is looked at and explained,' he says, 'it ap-' pears that the action is not of that nature, but the defendants are 'sued as common carriers;' and then he comments on the facts proved in that case.

In deference to that dictum, at the trial leave was given to move to enter a nonsuit, and a rule to that effect was granted, and has been fully discussed before us. We are not, however, now called upon to consider how far the law laid down in that dictum is correct, because we think it is clear in this case, as the learned Baron thought in that, that the injury has arisen from the defendants' misconduct as carriers, and not as railway proprietors. Although, in examining

Retouron negligence by discharged.
accident Prior Rule disc notice of action

under statute

the evidence against them as carriers, it was impossible wholly to LONDON & exclude some reference to the proof given as to the state of the rail-BRIGHTON RAILWAY COY. Way. As the defendants are liable in the character of carriers. the Negligent ma-Court thinks that no foundation exists for any argument in favour nagement of of the necessity of notice under the act. The plaintiff is, therefore, line and train.

Presumption of entitled to retain his verdict, and the rule for a nonsuit must be

Rule discharged.

The 253d section of the Railway act referred to is as follows:-- 'That no action, suit, or information, nor any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any per-'son or corporation for anything done, or omitted to be done, in pur-'suance of this Act, or in the execution of the powers or authorities, or suance of this Act, or in the execution of the powers or authorities, or any of the orders made, given, or directed in, by, or under this Act, unless twenty days' previous notice in writing shall be given by the party intending to commence and prosecute such action, suit, information, or other proceeding, to the intended defendant; nor unless such action, suit, information, or other proceeding, shall be brought or commenced within six calendar months after the act committed; or 'in case there shall be a continuation of damage, then within six 'calendar months next after the doing or committing such action 'shall have ceased; nor unless such action, suit, or information, shall 'be laid and brought in the county and place where the matter in dis-'pute or cause of action shall arise.'

Brash and OTHERS v. W. STEET F Coach accident, solatium.

27th February 1845.—Brash and Others, Pursuers, against WILLIAM STEELE, &c., Defenders.—Jur. 17, p. 267. D. B. M., 7, p. 539.

This was an action of damages at the instance of the widow and children of Robert Brash, who was a passenger by the 'Defiance' coach, on 8th July 1845, when it was overturned in Selkirk, whereby he was seriously injured, and died on 19th July. The issue was.—' Whether, on ' said day, in or near Selkirk, said coach was overturned, ' by the unskilfulness, rashness, or negligence of the driver, ' then the servant or in the employment of the defenders; ' and whether the deceased Robert Brash, being an outside ' passenger on said coach, thereby received severe bodily ' harm, or such bodily injuries as caused his death, on or ' about the 19th day of said month of July, to the loss, in-' jury, and damage of the pursuers, or any of them.'

The defenders alleged that the deceased was of such habits that he lived separate from his wife and family for some years, and that in place of supporting them, his wife allowed him a provision of L80 a-year, which exclusively belonged They moved for a commission and diligence to recover documents to prove this. Among other writings specified on this item appeared :---4. 'All letters between OTHERS of W the deceased had lived on improper terms with her.' The solution. Court granted the diligence, being of opinion that everything affecting the value of the father's life was relevant. only difficulty entertained was as regarded the letters in the Lord Moncrieff observed, 'My diffihands of the servant. 'culty is, as to the interest of the third party, not here. 'As to the correspondence in her possession, she can pro-'tect herself: as to others, she has herself to blame if she ' wrote them-of course, the letters to be recovered are only ' such as go to prove the averments on record.'

13th December 1845.—CHARLES MORTON against THE EDIN-MORTON 7. THE BURGH AND GLASGOW RAILWAY Co.—18 Jurist, p. 134. EDINBURGH GLASG. RAI D. B. M. 8, p. 288. WAY Co. Railway acc dent.

This was an action at the instance of Mr. Morton, as factor loco tutoris for the children of the deceased Thomas Cooley, horse-dealer in Glasgow, who was killed on the railway as alleged, through the fault of the defenders, while travelling as a passenger to Edinburgh.

The following was the issue got by the pursuer for the trial of the case:—' It being admitted that, on or about the 19th day of May 1845, the said deceased Thomas Cooley ' was killed while passing from Glasgow to Edinburgh in a 'railway carriage belonging to the defenders, Whether the ' death of the said Thomas Cooley was caused by fault, negligence, or want of skill on the part of the defenders or 'others, or another in their employment, and for whom 'they were and are responsible, to the loss, injury, and ' damage of the said Mary Cooley and Thomas Cooley, or 'either of them. Damages laid at L.5000.' The defenders admitted the death. They objected to the pursuer's issue, and proposed the following:-It being also admitted, that the death of the said Thomas Cooley was caused by fault, negligence, or want of skill on the part of the persons in the employment of the defenders, and for whom they are responsible, to the loss, injury, and damage of the said Mary Cooley and Thomas Cooley, What is the amount of the said I'HE loss, injury, and damage? The Lord Ordinary made aviant zandum to the Second Division of the Court, and it was one or orally debated before the judges of both divisions.

LORD JUSTICE-GENERAL.—We are now adjusting issues, and have to determine which issue ought to be adopted. The defenders propose, by an admission, to narrow the question to be tried between the parties. They propose to make an admission in the very words of the pursuer's issue; but the question is, Whether, by such an admission, they are entitled to exclude the pursuer from bringing the whole circumstances of the case before the jury? In a case of this description. I think the way and manner of the accident is a most important element for consideration in fixing the amount of damage. In the case of Brown v. M'Gregor, in 1813, before the introduction of the Jury Court into Scotland, the Court took into view the very peculiar circumstances of that case. There was a race between the driver of a public coach and the driver of a private chaise. driver of the coach had been drinking, and his master had had his attention called to the state he was in, yet he allowed him to go on. The race took place, the coach was overturned, and the passenger killed. The Court, in that case, found the proprietors liable, on a view of the whole circumstances of the case. Brown, the passenger who was killed, was insane, and on his way to a madhouse; and the Court taking that into account, along with the circumstances attending the death, awarded L800. It is impossible to doubt that, if it should appear on evidence in this case, that the accident was the result of gross negligence, and one which could reasonably have been anticipated; that that would be a most material fact for the consideration of the jury in determining the amount of damage. I do not think. therefore, that the defenders can step forward and attempt, by an admission of this kind, to prevent the pursuer bringing his case fully and fairly before the jury. We know that the jury should not give vindictive damages, and that it will be the first duty of my learned friend, who is to preside at the trial, to tell the jury not to award such damages.

LORD FULLERTON.—The ordinary issue is, Whether the death was caused by the one party, to the loss, injury, and damage of the other? But in this case the defenders attempt to alter the issue by an admission. The question then comes to be, If the pursuer proposes to take the usual issue in such actions, can he be forced to alter it by such an admission? I think the pursuer is entitled to reject the admission, and say that he will prove his case. If the defenders say that such a course will injure them, they must shew how it will. If such a departure from the usual practice was to be allowed, it would just come to this, that in every case of this sort there should be separate issues as to the liability and damages; and not only that, but that they be should tried by two separate juries; but I think that would be going too far. Until the party can convince me that they will suffer damage by adopting the ordinary form of issue, I do not think it should be departed from. They are not entitled to tell the jury to put the whole circumstances of the case entirely out of view, and make an arithmetical calculation as to the value of Morton v. The the loss. That would be treating this gentleman like a bale of Edinburgh & goods, which the company can destroy or not at pleasure, and which way Co. can be supplied again in the market. The case of passengers and Railway accigoods are quite different. In the case of passengers, the question dent. cannot be limited to a question of pecuniary loss. There is damages for injury to feelings, and solatium. An action for damages for the death of a father would be quite competent at the instance of a son, who succeeded to L.20,000 a-year by the death. In practice, all kind of circumstances must be taken into account. It is to be remarked also, that while the defenders admit liability, they do not admit the summons.

LORD MONCRIEFF.—When the point was first stated, I must confess I had the same difficulty as has been expressed by Lords Mackenzie and Medwyn, viz., that the same issue should not be sent to the jury where there is an admission of liability, and where there is not, but after the discussion, I feel constrained to agree with your Lordship. It is not correct to say that this is the ordinary form of issue, for there are many cases where the Court have found damages due, and have remitted to a jury to fix the amount. I must say, I thought the second issue might have been enough, because I think that, under it, the pursuer would be entitled to go into his whole case; but when I find it made a serious question, whether under it the pursuer would be allowed to do so or not, I agree with your Lordship, on the understanding that it will be made clear to the jury that the defenders have all along admitted the liability.

The Court 'find, in conformity with the opinion of the consulted ' judges, that the issues prepared by the jury clerks shall be the issue ' to try this cause.'

9th Dec. 1846.—Janet M'Intosh or M'Aulay, Pursuer, M'Aulay v. against Wm. Fernie, Buist, & Co., Defenders.—19 Jur., & Co. Injury for in-sufficiency of machinery. D. B. M. 9, p. 245. p. 81.

The defenders, coal and iron masters, were in possession of the pit or works, known as the Millfield Colliery, near On 1st August 1844, Thomas M'Aulay and John Lindsay, two workmen in their employment, were killed by an accident in the pit.

The pursuer, the widow of M'Aulay, raised an action of damages against the defenders. The issue was whether 'the ' death of the said Thomas M'Aulay was caused by the in-'sufficiency of the machinery provided and used by the de-'fenders, or others acting for them, for the purpose of en-'abling their workmen to descend into the said pit, or by machinery.

M'AULAY v. 'the fault, negligence or want of skill of the defenders, or & Co. 'others as aforesaid, to the loss, injury, and damage of the Injury from insufficiency of 'pursuer.'

It appeared from the evidence, that there was in the main pit at the colliery a wooden partition, dividing it into two parts, the one for the management and separation of the water, the other for the coal and ironstone; and that the means of descent on the one side of the partition was a steam engine, while on the other, it was necessary to use a crane for lowering the men.

On the evidence adduced at the trial, the jury returned a verdict for the pursuer, assessing damages at £200 to the widow, and £200 to the children. A motion was made for a rule to shew cause why this verdict should not be set aside and a new trial granted. On advising—

THE LORD JUSTICE-GENERAL.—In this case we granted a rule upon the pursuers, to shew cause why a new trial should not be granted. And on reference to the question, whether there ought to be a new trial, the evidence taken by me at the trial has been fully laid before your Lordships.

I had no difficulty at the trial in expounding to the jury the law, applicable to such a question as the present, viz., that where persons acting by the directions of those having charge of this work, cause an accident like this, whether through defective skill, or defective machinery, there is no doubt that their employers are responsible. As to the evidence, the charge delivered to the jury had no leaning on the one side, or upon the other, and the jury, after considering that evidence, returned a verdict for the pursuers, with £400 of damages. It is that verdict which we are now called upon to set aside, as contrary to evidence. There is not here any question as to misdirection in point of law, or misconstruction of evidence; the sole ground of this application, is that the verdict is contrary to evidence. a case which I consider as of great importance, not only to these parties, but to the law, with reference to the principles which are applicable to a case of this nature. I have gone to the source from which these principles are derived; I mean the decisions which have been pronounced by the Jury Court, and this Court, from the introduction of Jury Trial to the present time. Now looking to the principles which have been laid down in the cases from that of Baillie v. Bryson downwards, I feel very clear that, on a motion to set aside this verdict as contrary to evidence, we could not properly grant a new trial, merely because, as jurors, we had taken a different view of its import from that which was taken by the jury. If we did so, we would be usurping functions which the law has not committed to us. I apprehend it to be clear, that to set aside such a verdict, on the ground that it is contrary to evidence, there must be a M'AULAY v. great preponderance of evidence against the verdict. The weight of & Co. evidence must be against the verdict; must be flagrantly against it. Injury from in-Now in this case, there was evidence on both sides, both as to the sufficiency of insufficiency of the machinery, and as to the neglect of the men.

On the first point, engineers were examined on both sides, and on the other the pursuers' witnesses were subjected to a cross examination on the part of the defenders. Therefore there was evidence of a conflicting nature upon both points laid before the jury; and according to the principles laid down in the cases which I have consulted, it is obviously the peculiar province of the jury to weigh and consider the evidence, and to act upon their impressions of it.

Now feeling bound to act upon these principles, how are we to dispose of this case? The issue is rested on two grounds. The jury have returned, as they were entitled to do, a general finding for the pursuer. Their verdict conveys no information whether they proceeded upon one only of these points or upon both, whether upon the deficiency of the machinery, and also upon the neglect of those in charge of it, or upon only one of these grounds. Their verdict is for the pursuers generally. I cannot say whether they returned it from a combined view of the whole case, or in consideration of only one of these points. But the verdict stands generally for the pursuers, and assesses the damage at £400.

Now I am quite aware that much stress has been laid upon what is assumed by the defenders, the great preponderance of the evidence for the superiority of the machinery. It may be, that if the sufficiency of the machinery were the only point at issue, it would be right to investigate on which side the preponderance of evidence lay. But that is not the way in which the case was disposed of. Both branches were under consideration, and it is impossible to say upon which the jury relied. We must take the verdict as it is, that is, as a general verdict.

Now, at the trial, it was mainly contended on the defenders' side, that the whole accident was the act of God, and the Lord Advocate has on their side pressed with great ingenuity the argument, that the whole case of the pursuers rests on a mere theory of their own. But I must say that, now that we are compelled to give our impressions of the evidence on this motion, it appears to me that the result is by no means ambiguous. (Here his Lordship referred to his notes This evidence establishes, beyond all controversy, of the evidence). that the machinery was defective, and that it was entrusted to unskilful hands—to persons not used to the management of it. It is said that more evidence might have been, or might still be, adduced to clear up some points in the defenders' favour; but if in any case, parties going to a jury choose to starve the case—to leave it ambiguous they must just take the consequences, and upon the whole I am not surprised at the conclusion to which the jury have come. I am therefore for refusing this motion.

LORD MACKENZIE.—I concur both in the principles which your

M'AULAY v. Lordship has laid down, and in their application to the present case. FERNIE, BUIST His Lordship entered into a detailed examination of the evidence.

Injury from insufficiency of machinery.

of Lordship, who tried the case, confirming my opinion, which is against granting a new trial. I cannot hold that the verdict was contrary to the evidence, and without going over the details of the evidence which have been considered by your Lordship, I may say that I am disposed to rest my opinion on a more general ground.

One thing of course here does certainly excite surprise, I mean the extreme scantiness of the proof, and the extraordinary backwardness, on both sides, to call various witnesses who might be naturally

supposed able to give information on the matter.

There seems to have been employed in putting up the crane, besides the two unfortunate sufferers, Neilson, the underground overseer, Baird the smith, Sime, Allan, and Pride. And when the accident took place, there were present Sime and Allan, who were working the crane, Graham, Neilson, and Colquhoun, who, one of the witnesses (Pride) says, came up when "the crane was going off to let down the scaffold," and was the person who tried to stop the motion by thrusting in the wooden spoke. Now of these, only Sime, Pride, and Graham, appear as witnesses. We have neither Allan, one of the men who was working the crane, nor Colquhoun, Neilson, nor Baird the smith, the last two of whom were present at the putting up of the machine.

The question, who is to suffer by this manifest failure to call evidence, is an important one, but it is one which the jury were entitled to determine for themselves, because it just resolved into the question, what were the fair inferences or presumptions in fact arising from the evidence which was before them, and as it stood, unqualified by any further explanation which might possibly have been given

by the witnesses not called.

Now in this point of view, I really see no objection to the conclusion come to by the jury, for I cannot adopt the principle, which was evidently assumed in the able argument on the part of the defenders, viz., that the verdict must be held to be against evidence, unless the pursuer proved the specific defect of the machine, or specific neglect of the defenders, which occasioned the accident.

In the opinions already delivered, your Lordships have minutely examined the proof, in order to shew that even on this view the verdict could not be said to be contrary to the evidence. But I am disposed to go farther. I cannot admit the principle contended for on the part of the defenders. It appears to me, that in their argument there was overlooked the most important piece of evidence of all. I mean the fair inference from the fact of the accident itself, as it is proved to have taken place. Taking the evidence of Sime and Pride, what have we but the fact, that after the men got upon the scaffold, and were let down about two turns and a half, it began to revolve, so as to defy the exertions of the two men who were at the handles; that the plummer-block flew up; the big wheel gave way; in short, as Pride expresses it, "the crane flung to pieces." Now

what is the fair inference of fact, which any man of ordinary sense M'AULAY v. would draw from the account of the accident? What, but that the & Co. machine was in some essential particular defective?

When a man is ordered by his employer to mount a ladder, and be-sufficiency of the has not half way up the ladd. fore he has got half way up, the ladder goes to pieces, or when half machinery. a dozen of men are put upon a scaffold, and the immediate consequence is the fall of the scaffold, what is the fair and natural conclusions, but that the one or the other were defective. To say that in such a case, the sufferers, in order to make out the responsibility of their employers, are bound to prove the specific defect which occasioned the failure, would be in many cases an absolute denial of justice. How is a pursuer to prove this. In this very case, how could the pursuer make out the particular defect of the machine, which those acting for them had no means of examining till after the machine was in pieces, and had been patched up and put together again. And no examination of that kind could shew the exact state in which it was when the accident occurred.

I think then, that in every analogous case the fair inference of defect in the machine, or neglect, must arise from the very fact of the accident itself. Here is an operation, viz., going down a coal pit. which is performed with perfect safety by thousands of persons every morning; in which accidents of this kind happen, in general, entirely from the defects of the machinery. Is not a jury fairly entitled to hold, as in a question of fact, that such was the case here. And what is the answer of the defenders? That it may have arisen from some damnum fatale, some unaccountable failure of the machine, against which no human foresight could guard. This no doubt is possible: but is it to be presumed, contrary to universal experience? And is it not the business of the party who offers the explanation to prove it, by shewing that all the ordinary precautions were taken in the erection or construction of the machinery? and how has that obligation been performed here? It is proved that the crane employed, was one which had been for sometime out of use. It was lying in pieces in some shed or outhouse. It was put together by various persons, including Neilson the underground overseer, and Baird the smith, yet neither of these persons were called to shew that it was properly put up, or had been examined by any person qualified to give an opinion on its safety. No examinations of the fractured crane by engineers after the accident could supply that deficiency of evidence. The materials, the different pieces of which it was composed, might be all perfectly sound, and the defect may have been, as I think it probably was here, in the putting together, a matter which was absolutely impossible for the pursuers to prove, though it was perfectly easy for the defenders to negative it, by calling the parties who superintended the construction. On their failure to do so, I must say, that I as a juryman, should have felt myself fairly entitled to draw the reasonable inference, in fact, from the nature of the accident as proved, that the proper precautions had been neglected, and that the crane was essentially defective.

And on this point of view, I think the verdict is an important one,

machinery.

M'AULAY v. which it would be most dangerous to interfere with. It cannot pos-FERNIE, BUIST sibly be interfered with as against evidence, except on the assumption Injury from in-that an accident of this kind is to be presumably ascribed to some sufficiency of latent and undiscoverable defect unless the authority of latent and of latent and undiscoverable defect, unless the sufferer can prove the exact cause of the accident, the specific defect of the machinery, or neglect in the management by which it was occasioned. I think all the presumption and probabilities lie the other way. And it is important for the defenders, and other persons in similar circumstances. to know how such cases will probably be dealt with, and I think justly dealt with, by juries, when workmen are to be employed in operations which, though safe enough when proper precautions are taken, are mortally hazardous if those precautions are neglected. it is the duty of the employer to see that all the necessary provisions are made which human foresight can suggest, and if that is done, it can easily be proved by those in attendance. On the other hand, if it be not done, or if the persons to whom it was entrusted are not called, they cannot be surprised that juries will draw, what I think, is the fair and reasonable inference, that a crane or other construction which goes to pieces the instant that it is put up to use, was grossly and essentially defective.

I see no reason whatever, therefore, for disturbing the verdict in

LORD JEFFREY.—I have great satisfaction in expressing my concurrence in what has fallen from your Lordships, more especially from Lord Fullerton. We are not called upon to say that the jury has here decided upon two opposite cases of proof, for truly the case of the defenders rests upon nothing at all. I do not think we are called on to disturb a verdict against a party whose whole defence seems to be this, that he did not know how it happened, and thinks it should be presumed that the accident was an act of God. What is the evidence usually required of a person who is called to answer for an accident arising from the failure of his machinery? Why, he is expected at least to prove that great care was taken in its erection, and that it was carefully inspected before being used. A party on whom such a responsibility is sought to be fastened, is not entitled to fall back on providence. No doubt the party suing for damages must instruct the accident which is the foundation of his claim; but when that is done, the onus lies upon the other to prove that it was not owing to the defective state of the machinery.

Verdict sustained.

Sneddon v. MIL-Addie, LAR, and RAN-KINE. Injury in coal16th December 1848. — WILLIAM SNEDDON, Pursuer, against Messrs. Addie, Millar, and Rankine, Defenders.—Jur., vol. xxi., p. 62. D. B. M. xi., p. 1159.

This was an action of damages, and contained the following as the grounds thereof:--- 'That the pursuer was in

the employment of the defenders as a miner for some time, SNEDDON v. and down to the date after-mentioned: That on or about LAR, and RANthe 23d May 1848, as the pursuer was ascending the KINE. ' ironstone pit No 1, Gravrigg, near Darngavel Works, be-pit-' longing to the defenders, in a cage used by them for raising ' and lowering the men employed by them, he was seriously ' hurt and injured in his body: That the injury so received ' was caused by the fault, negligence, or want of skill of 'the defenders, or of the persons then in charge of the engine, and for whom they are responsible; or by the ' insufficiency of the engine, cage, or machinery, or trap-' door or entry used by the defenders, or others acting for 'them, in raising and lowering the workmen engaged in ' said pit: That the pursuer had been working during the 'night in the said pit; and about four or five in the 'morning of the 23d of May, or thereabout, having ascended ' the pit in the cage, and about to enter the said trap-door. 'the engine all at once, moved on, whereby the pursuer, ' being half out of the said cage, was crushed or squeezed 'against the wood-work and beams forming the frame-work 'at the pit-mouth, and otherwise dreadfully injured: That 'the pursuer was carried home in a lifeless state, and ever ' since has been unable to work, or to earn any subsistence 'for himself and family.' The preliminary defence was-That the pursuer must state in precise terms the specific cause of the alleged injury, and the specific nature of the fault imputed to the defenders, from which fault the injury is said to have arisen. There being no such specification in the summons, it is irrelevant. The engine might have been moved, compatible with freedom from blame on the part of the defenders or their servants, and quite compatible with what was really the cause of the accident—the culpable rashness of the pursuer in attempting to get out of An issue was ordered, the cage before the proper time. and the pursuer having proposed one which was not approved of by the Issue Clerks, the Lord Ordinary ordered a condesecondence of the facts on which the pursuer supported his summons, and answers by the defenders; adding, in a note;—'It appears to the Lord Ordinary that the pursuer ought to state, in his condescendence, whether the injury he met

SNEDDON 2. ' with arose from defective machinery, or want of skill in ADDIE, MIL- those employed, or from both these causes, for which the KINE. Injury in coal- 'defenders are responsible.' The pursuer reclaimed, maintaining that the summons was sufficiently specific, and that it is sufficient to state that injury was sustained, which raised the presumption of fault on the defenders. Mackenzie proposed, by way of amendment, to add, after the words, 'about to enter the trap-door, the engine,' the words, 'instead of stopping to give sufficient time for the 'pursuer entering, as it ought to have done, all at once 'moved,' &c. This was adopted, and the Court, in respect of the amendment, recalled the interlocutor, and remitted the case.

> On 16th June 1849, (21 Jur. p. 454,) the case came up for adjustment of the issues. The following were proposed by the Issue Clerks:—'It being admitted that the pursuer was in

' the employment of the defenders, as an ironstone miner, in working in a pit at Gravings, in the parish of New. 'Monklands, the property of the defenders, It being also 'admitted that, on the morning of the 23d of May last, the 'pursuer was engaged in said employer's work, Whether ' the pursuer, on the said occasion, met with severe bodily 'injuries; and whether the said injuries were caused by 'the faulty construction or insufficiency of the cage or ' machinery provided and used by the defenders, or others 'acting for them, for the purpose of enabling their work-'men to descend or ascend the said pit? or by the fault, 'negligence, or want of skill of the defenders, or others 'acting for them, to the loss, injury, and damage of the 'pursuer.' The second issue, as drawn out by the Lord Ordinary, read as follows:-- 'Whether the pursuer, on said 'occasion, met with severe bodily injuries, caused by the 'fault, negligence, or want of skill of the defenders, or

' others acting for them, either in the defective construction ' or insufficiency of the cage or machinery provided and ' used, for the purpose of enabling the defenders' workmen 'to ascend or descend the said pit, or in the working of ' the said machinery, (or otherwise,) to the loss, injury, and

The pursuer supported the first issue; the second put it-

' damage of the pursuer.'



entirely on the fault and negligence of the defenders. entirely on the fault and negligence of the defenders. Sup-SNEDDON v. Pose it to be proved that the machinery used was not the LAR, and RANproper kind used for the purpose? The defenders answered KINE. that the first issue puts it abstractly on the insufficiency, and pit if there is actual insufficiency, the pursuer puts his case as having right to recover. The defenders are not bound to guarantee absolute sufficiency—all they are bound to do is to do their best to secure sufficiency; but there may be a latent insufficiency which no scrutiny could detect, and for which the defenders would not be liable. The fact of the accident might raise the presumption of fault, but still fault was the ground of the liability.

LORD PRESIDENT.—I see the issue embraces both the questions of

insufficiency, and that of negligence also.

LORD MACKENZIE.—I do not think it infers absolute warrandice. Suppose the jury were to say, 'The accident did arise from insuffi-'ciency, but not such insufficiency as was blameable in the de-

BUCHANAN, for Pursuer.—This is not a case of fracture. We say that the engine was insufficient, and that the defenders were bound

to guarantee its sufficiency.

LORD JEFFREY.—I think so also. But this seems to me the most unlikely of all cases for such a verdict as that which Lord Mackenzie has supposed. If a case were to come to that point, a special verdict might be pressed for.

PATON.—If a fault of any kind be alleged, we have no objections to meet it; but insufficiency merely will not avail. We are not bound to warrant absolutely. Suppose the machinery had been in-

spected that very morning, and declared perfect?

LORD MACKENZIE.—I cannot adopt the proposition that a party

is liable, without any blame attaching to him.

BUCHANAN.—Even in the case put of inspection that morning, the party would still be liable. But no such question can arise in the present case. At any rate, there is nothing to prevent the de-

fenders proving that they took every precaution.

LORD MACKENZIE.—If the party had done everything he could to ensure sufficiency, (I do not say that it would be enough that there had been such an inspection as spoken of; but say he had himself gone down into the pit by this engine that very morning, and escaped any injury,) I say, I think there would be great difficulty in holding him liable in such a case as that. I think there must be some culpa, however small. The principle cannot go very far; and the presumption undoubtedly is, that there was blame.

LORD JEFFREY.—I do not think this a case of much importance. on the point argued, I think the pursuer will have little difficulty,

if his averment be true.

SNEDDON v. LORD PRESIDENT.—What is the meaning of the last part of the Addie, Mil- first issue?

LAR, and RANLORD MACKENZIE.—The second issue is still wider, for it bears
Injury in coal-the words 'or otherwise.' I should decidedly object to that.

Buchanan.—The words, 'in the use or management thereof,' can be introduced into the first issue.

The first issue was approved generally, but the conclusion altered as follows:—'Or by the fault, negligence, or want of skill of the 'defenders, or others acting for them, in the use or management of 'the said machinery, to the loss, injury, and damage of the pursuer.'

M'GLASHAN v. 24th June 1848.—EDWARD M'GLASHAN, Pursuer, against Perth Rail-way Co.

DUNDEE and PERTH RAILWAY Co.—20 Jurist, p. 508.

B. B. M. x., p. 1397.

This was action of damages against the Railway Company, for injury sustained by the pursuer while travelling as a passenger from Dundee to Perth: and it was libelled on the ground of gross fault, negligence, or want of skill on the part of the defenders, or of their directors, or servants, or others in their employment, or by the insufficiency or malconstruction of the railway, or works therewith connected, or of the carriages, engines, or other machinery; in particular, the carriage in which the pursuer was placed was thrown or separated from the rails, in consequence of gross and culpable insufficiency in the construction or condition of said rails, or of the supports on which the said rails rested, and that at or near the point where the carriages were thrown and separated from the rails, and in consequence of which the rails were grossly inadequate to support the weight of the carriage in which the pursuer was placed, or of the train to which that carriage was attached, and yielded and gave way under the pressure of That the aforesaid insufficiency was a thing the same. which the defenders were bound to have been aware of and to have provided against, and for which, and the consequences thereof, they are legally responsible to the pursuer = but farther, and at all events, the defenders, through their directors, or other office-bearers or officers, had been previously certiorated and made aware that the said insufficiency existed and required to be immediately remedied, but they neg lected or failed to take the ordinary or proper precautions i protecting the lives and safety of the passengers, for whom M'GLASHAN v the defenders were responsible, and of the pursuer in particular. PERTH RAIL-WAY Co.

In defence, it was pled that the accident not having been Railway acci-

occasioned in any respect by their fault, or in any way for dent. which they are responsible, they were not liable in damages. The issue, as drawn by the clerks, was, after the usual admissions.—' Whether the said train was on said occasion ' thrown off or separated from the rails, and the carriage in ' which the pursuer travelled was broken and destroyed, and the pursuer was grievously injured in his person, to his ' loss, injury, and damage.' Both parties objected to the issue. The pursuer proposed the following:—' Whether the said ' train, or part thereof, was on said occasion thrown off or ' separated from the rails, and the carriage in which the ' pursuer travelled was broken or destroyed, in consequence of the fault, negligence, or want of skill of the defenders. ' or others in their employment, and for whom they are re-'sponsible, or through the insufficiency or malconstruction of the defenders' railway, or works, or of their carriages, 'engines, or other machinery, whereby the pursuer was 'seriously injured in his person, to his loss, injury, and The Lord Ordinary reported the case, and the defenders objected, that while, in the first clause, the defenders were taken liable only in so far as they were responsible for their servants, no such restriction was made in the second clause with regard to the carriages, engines, or machinery. It was quite possible, however, that the accident might have been caused by insufficiency, which would have defied the utmost skill and care to discern, and for which, consequently, the defenders were not liable; yet, under the issue as proposed, it would not be open for the defenders to prove their non-liability. The pursuer wished to try the question simply, whether he had been injured without any fault on his part, whereas the proper question was, whether he had suffered from any fault of the defenders.

LORD JUSTICE-GENERAL.—The insertion of the words, 'for which 'they are responsible,' after the word 'machinery,' would do all that the defenders require. The defenders assented.

LORD FULLERTON.—I am for the issue as it stands.

LORD JEFFREY.—That would still leave it quite open to the de-

M'GLASHAN v. fender to prove that the accident arose from an insufficiency, for DUNDEE AND which they were not answerable. The Court approved of the issue way Co. as proposed by pursuers.

Railway acciThe case was compromised before trial.

GILLE. DUNDER & PERTH RAIL WAY Co. Railway accident.

Hood or Car-7th December 1848.—Mrs. EUPHEMIA HOOD or CARGILL. Pursuer, against THE DUNDEE AND PERTH RAILWAY CO. ---21 Jurist. p. 51. D. B. M. xi., p. 216.

> This was an action of damages at the pursuer's instance against the defenders, to recover for loss sustained in consequence of the death of her husband, who was killed while travelling as a passenger by the Dundee and Perth Railway. The summons averred,—' That in course of the said jour-'nev, and when travelling at great and improper velocity. the locomotive steam engine, and carriages attached there-'to and in particular, the carriage in which the said de-' ceased James Cargill was placed, were thrown off, or other-'wise separated from the rails with great violence, at a 'curve in the said railway, and at or near to a bridge or ' viaduct under the said railway, distant about four miles 'and three quarters of a mile or thereby from Dundee. 'That in consequence of the said throwing off, or other se-' paration of the engine and carriages from the railway. 'when moving at the velocity aforesaid, the said carriage, ' in which the said deceased James Cargill was placed. was 'broken and destroyed, and he was thereby killed on the That in consequence of the death of the said de-'spot. ' ceased James Cargill, in the circumstances before detailed, the pursuer. Mrs Cargill, has been deprived of an affection-'ate husband, &c.,—all of which injuries arose from, and 'were occasioned by the insufficiency, unsuitableness, and 'dangerous state of the said railway, works, machinery. 'engine, and carriages, or one or other of them, and the 'improper failure of the defenders to have their said railway, and works connected therewith, in a good, safe, and ' sufficient state and condition, and to have the engine. ma-'chinery, and carriages suitable and sufficient, or otherwise ' that the said injury, loss, and damage was caused by the 'gross fault, negligence, or want of due caution, skill, and attention on the part of the defenders, or of their directors.

or servants, or others, or another, in the employment of HOOD OF CAR-'the defenders and for whom the defenders were and are & PERTH RAIL-That, in particular, the carriage in which the Railway acci-' responsible. 'said James Cargill was placed was thrown or separated dent. ' from the rails, and destroyed as aforesaid, in consequence of gross and culpable insufficiency or malconstruction of the said railway, and works connected therewith, or of the ' inadequate fastenings and supports of the rails, or of the 'malconstruction and insecure state of a viaduct or bridge ' under the line of railway, near the place where the said 'James Cargill was killed, as aforesaid, and of the insuffi-'ciency, unsuitable construction, and great weight of the engine to which the said train was attached, the two centre or driving wheels of which wanted flanges, and of ' the great velocity at which the train was driven, especially 'when on a curve or in consequence of one or other of ' these causes, or of some other cause or causes unknown to ' the said Mrs. Cargill, but arising from, and attributable to. the gross fault, negligence, and want of the necessary and 'competent skill, attention, and knowledge of the said de-'fenders, or of their said directors, or others in their em-' ployment, and for whom they were and are responsible. 'That the aforesaid insufficiency, arising from the fault, ne-'gligence, or culpable inattention of the defenders, was a 'thing which the defenders were bound to have been aware ' of, and to have provided against, and for the consequences ' of which, in so far as relates to the death of her husband, 'they are legally responsible to the said Mrs. Cargill. But. 'further, that the defenders, through their directors, other 'office-bearers, servants, or others, had been previously cer-'tiorated, and made aware that the said insufficiency. or ' part of such insufficiency, existed, and required to be im-'mediately remedied; and although they had, sometime before the said 22d of July 1847, laid down materials ' with a view to remedy part of said insufficiency, and un-' safe part of said railway or works, near to the place where ' the said James Cargill was killed, nevertheless the defend-'ers took no precautionary steps whatever for the interim ' protection or safety of their passengers, at least until after 'that date, or after the occurrence above libelled had taken 'place.'

The defenders averred.—That the accident which occur-

HOOD or CAR-GILLU. DUNDER

& Perte Rail-red was in nowise attributable to any negligence or want of WAY UO.
Railway acci-care or skill on the part of the defenders or their servants in the discharge of their duty. Every possible care had been taken in the construction and maintenance of the works, and every degree of caution was observed in conducting the train on the occasion libelled. The result of every investigation which the defenders have made into the causes of the accident leads them to the conclusion. that it arose from the splitting or breaking of a joint chair, used to support the iron rails of the line, at a part of it situated upon or near to the west end of the bridge or viaduct at Pilmore. This chair, immediately previous to the accident, was in its proper position, and, as the defenders believe, gave way, not in consequence of any discernible defect in the joint chair itself, or of any insufficiency in the construction or condition of the line or works therewith connected, but solely from the pressure of the engine or train passing over it operating, in some accidental manner, such as will occasionally happen without any fault. and against the effect of which the defenders could have taken no effectual precautions. Even should the defenders be in error in thus ascribing the probable cause of the accident to the breaking of the joint-chair, now referred to, they are still satisfied that the unfortunate event did not result from any of the causes alleged in the summons, but must have arisen from some latent and inexplicable cause. which they could not obviate or control, and which may occasionally produce such a misfortune, even when the greatest care and pains have been taken to avert it.

The defenders consequently pled, that they were not liable for the consequences of every insufficiency or malconstruction of the works or machinery, but only for the consequence of such insufficiency or malconstruction respectively, as in its origin or continuance infers fault or negligence on their part, or of those for whom they are responsible. That the only ground on which they could be made liable was that of fault or negligence on their part. The issue proposed by the pursuer was one of mere insufficiency only; whereas the issue ought to be such as to make the jury aware, that if the defenders had done everything which human prudence Hood or Carcould suggest, they were free from all claim of damages.

& PERTH RAIL-WAY Co.

LORD JUSTICE-CLERK.—I should wish counsel to consider whether Railway accithere is not a difference between this case and that of the stage coach. inasmuch as here the Railway Company themselves make the road and the machinery, and the relative insufficiency is expressly libelled in the summons, and inserted in the issue. Argued by defenders-That point was, to a certain extent, raised in the case of Carpue v. London and Brighton Railway, 8th February 1844, but the principle is the same. They are liable, only in so far as insufficiency can be connected with their own culpa; and all they desire at present is, to be enabled to prove their non-liability. The argument of the pursuer is, that any alteration in the issue would throw on her the onus of insufficiency; but it would not, if it be law that the accident pre-

sumes culpa-all she has to prove is the simple fact.

The pursuer answered,—She did not maintain that it was a case of warranty, so that the only question is the form of issue. Now, if any alteration was made, such as the defenders propose, the jury would naturally suppose the pursuer was bound to prove more than insufficiency or malconstruction; that he was bound to prove the insufficiency to be such as the defenders are liable for, which she is In point of law, if the pursuer prove insufficiency or malconstruction, she has a prima facie case, and it is for the defenders to prove the insufficiency or malconstruction to be such as they are not The Court approved of the following issue in the case:-Whether the said train, or part thereof, was on said occasion thrown off or separated from the rails, and the carriage in which the said ' James Cargill travelled was broken or destroyed, in consequence of the fault, negligence, or want of skill of the defenders, or others for whom they are responsible, either in conducting the said train, or ' in constructing or maintaining the defenders' railway or works, or 'in providing sufficient carriages, engines, or other machinery, whereby the said James Cargill was killed on the spot, to the loss, 'injury, and damage of the pursuer.'

The case was compromised before trial.

5th July 1849.—Court of Exchequer.—Reedle against Reedle v.
THE LONDON & NORTH WESTERN RAILWAY COMPANY.—NORTH WEST-Railway Cases, vol. vi., p. 184-8.

ERN RAIL. Co. Injury by ser-vant of contractor.

This was an action by the widow of Patrick Reedie to recover damages against the Company under 9 and 10 Vict. c. 93, for the death of her husband. It appeared at the trial that Reedie was killed while passing under a viaduct. erected over a turnpike road in the county of York.

done by the servants of contractor.

REEDIE AND the deceased was passing under it, some workmen, employed LONDON AND by the contractors in the execution of the work, forced off NORTH WEST-ERN RAIL. Co. the parapet, to the road below, a huge block of stone, in Company not consequence of which Reedie was killed on the spot.

In 1845, 'The Leeds, Dewsbury, and Manchester Railway Company' was incorporated for the formation of the railway in question, and the Company contracted with Joseph Crawshaw and Richard Crawshaw, to make and complete the portion of the railway on which the viaduct was erected. with all the excavations, embankments, bridges, tunnels, viaducts, roads, fences, and other works connected therewith, according to specification, for the sum of £55,000. provided by the deed that the works should be done by the contractors, but that the Company should have a general right of watching the progress, and if the contractors employed incompetent workmen, the Company should have the power of dismissing them. Messrs. Crawshaw proceeded to execute the works, and on 9th July 1847, while they were in progress, another Act was passed, making over the Leeds, Dewsbury, and Manchester Railway, and all its undertakings, as well those commenced as those which had not been commenced, and all debts, liabilities, and contracts, to be vested in the London and North Western Railway Company. and held in the same way as the Leeds, Dewsbury and Manchester Company. After the passing of this Act, the contractors continued to proceed with the works, and during that time the accident occurred.

At the trial, a verdict was returned for the plaintiff, leave being reserved for the defendants to move to enter a nonsuit, if the Court should be of opinion that the action would not lie.

A rule nisi having been obtained, the plaintiff showed cause.—She maintained that the defendants were liable upon the principle, that the known owner of fixed property is liable for an injury done in the progress of works going on for his benefit on that property, whether the persons causing the accident were his servants or not; for it must be assumed that the owner of property, in such a case, has the control over all persons working on his premises for his benefit.—(Grote, 5 Railway Cases, p. 649). Sly v. Edgley.

Bush v. Steinman, Randelson v. Murray, Matthews, 3 Camp. Reedle and Hobbit v. 403, Michael v. Alestree, 2 Lev. 172. If the stone had London and been insecurely fastened in the wall, and by reason thereof en Rail. Co. had caused the accident, then no doubt they would be liable, liable for inand so are they in the present case. The legislature has jury done by conferred on them certain privileges, and with those privi-contractor. leges it has cast on them the duty of seeing that these works, which can alone be executed by the defendants, shall be done so as to cause no injury in their construction.—Bell v. Hull and Selby Railway Co., Railway Cases, 1, p. 616, Laugher v. Pointer, Quarman v. Burnett, Rapson v. Cubitt, Allen v. Hayward, 7 Q. B. 960, Rich v. Basterfield, 4 C. B. 783, Semple v. London and Brighton Railway, Railway Cases, 1, p. 120, Machu v. South Western Railway Co., Railway Cases, 5, p. 302.

The defendants, in support of the rule—maintained that the true principle of all the cases is, that he who sustains an injury, must proceed against the party who committed it, or those who employ him; and the question in these latter cases is, was the party who did the act, the servant of the party causing the injury? and there is no distinction in this respect between fixed and moveable property, except perhaps in the former case, where the act complained of is a continuing nuisance.—Witte v. Hague, 2 D. and R. 33, Allen v. Hayward, Burgess v. Gray, 1 C. B. 578, Milligan v. Wedge, Rex v. Watson, 2 Ld. Raym. 66, Ramsden v. The Manchester South Junction Co., Railway Cases, 5, p. 552. Judgment deferred.

The case of Hobbit against The London and North Western Railway Company, was precisely the same on the facts, as the case of Reedie; and the question in both cases came up for decision at the same time—(Before Parke, B., Alderson, B., Rolfe, B., and Platt, B.)

ROLFE, B.—(After stating the pleadings and facts in *Reedie* v. the *North Western Railway Company*.) It appears to us clear that, after the passing of the second act the contract with Messrs Crawshaw was transferred to the present defendants, so as to make them liable to the same extent precisely as the original Leeds, Dewsbury, and Manchester Company would have been, if the second act had not passed.

jury done by

But after full consideration of the subject, we are of opinion that NORTH WEST neither the defendants nor the original Company are liable. ERN RAIL. Co. case of Quarman v. Burnett this Court decided, adopting the opinion Company not of Lord Tenterden and Mr. Justice Littledale in Laugher v. Pointer, liable for inthat the liability to make compensation for an injury arising from the servants of the neglect of a person driving a carriage attaches only on the driver, the contractors or on the person employing him. The liability of any other

than the party actually guilty of any wrongful act proceeds on the maxim, "Qui facit per alium, facit per se." The party employing has the selection of the party employed; and it is reasonable that he who has made a choice of an unskilful or careless person to execute. his orders, should be responsible for any injury resulting from the want of skill, or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been The doctrine of Quarman v. Burnett has since been acted on in this Court in the case of Rapson v. Cubitt, and in the Court of Queen's Bench in Milliaun v. Wedge, and again in Allen

By these authorities we must consider the law to have been settled, and the only question is, whether the law so settled, is applicable to the facts of this case.

To shew that it was not, it was argued by the counsel for the plaintiff that there is a recognized distinction on this subject between injuries arising from the careless or unskilful management of an animal, or other personal chattel, and an injury resulting from the negligent management of fixed real property. In the latter case, it was contended that the owner is responsible for all injuries to passers by or others, howsoever they may have been occasioned, and here it was said that the defendants were at the time of the accident the owners of the railway, and so are the parties responsible.

This distinction as to fixed real property, is adverted to by Mr. Justice Littledale, in his very able judgment in Laugher v. Pointer. and it is also noticed in the judgment of this Court in Quarman v. But in neither of these cases was it necessary to decide whether such a distinction did or did not exist. The case of Bush v. Steinman, where the owner of a house was held liable for the act of a servant of a sub-contractor, acting under a builder, employed by the owner, was a case of fixed real property. That case was strongly pressed in argument, in support of the liability of the defendants, both in Laugher v. Pointer, and Quarman v. Burnett: and as the circumstances of those two cases were such as not to make it necessary to overrule Bush v. Steinman, if any distinction in point of law did exist in cases like the present between fixed property and ordinary moveable chattels, it was right to notice the point. But on full consideration, we have come to the conclusion, that there is no such distinction, unless perhaps in cases where the act complained of, is such as to amount to a nuisance, and, in fact that, acCording to the modern decisions, Bush v. Steinman must be taken Hobbit v.

Proof to be law, or at all events, that it cannot be supported on the North Westground on which the judgment of the Court proceeded.

ERN RAIL, CO. It is not necessary to decide, whether in any case the owner of Company not

real property, such as land or houses, may be responsible for nui-jury done by sances occasioned by the mode in which his property is used by the servants of others not standing in the relation of servants to him, or part of his the contractors. family. It may be that in some cases he is so responsible. then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If for instance a person occupying a house or a field, should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts, nor the acts of his servants. He would have violated the rule of law, 'sic utere tuo ut alienum non laedas.' is referred to by Mr. Justice Cresswell, in delivering the judgment of the Court of Common Pleas in Rich v. Basterfield (4 C. B. 802) as the principle on which parties possessed of fixed property are responsible for acts of nuisance occasioned by the mode in which the property is enjoyed, and, possibly on some such principle as this. the case of Bush v. Steinman may be supported. But certainly that doctrine cannot be applied to the case now before us. The wrongful act here could not in any possible sense be treated as a nuisance. It was one single act of negligence, and in such a case there is no principle for making any distinction by reason of the negligence having arisen in reference to real and not to personal property. defendants had employed a contractor carrying on an independent business, to repair their engines or carriages, and the contractor's workmen had negligently caused a heavy piece of iron to fall on a bystander, it would appear a strange doctrine to hold, that the defendants were responsible. Mr. Justice Littledale, in his very able judgment in Laugher v. Pointer, observed that the law does not recognise a several liability in two principals who are unconnected; if they are jointly liable you may sue either, but you cannot have two separately liable. This doctrine is one of general application, irrespective of the nature of the employment; and applying the principle to the present case, it would be impossible to hold the present defendants liable, without at the same time, deciding that the contractors are not liable, which it would be impossible to be contended. It remains only to be observed, that in none of the more modern cases has the alleged distinction between real and personal property been admitted. In Milligan v. Wedge, Lord Denman expresses doubt, as to the existence of such a distinction in any case; and in the more recent case of Allen v. Hayward, the judgment of the Court proceeded expressly on the ground that the contractor in a case like

the present, is the only party responsible. The last case so closely resembles the present, that even if we had not considered the decision right, we should probably have felt bound by it. But we see no reason to doubt its perfect correctness. It seems to follow as a contractors

HOBBIT v. necessary corollary from the principle of the preceding cases and en-London and North West-tirely to govern this.

ERN RAIL. Co. Our attention was directed during the argument, to the provisions Company not of the contract, whereby the defendants had the power of insisting jury done by on the removal of careless or incompetent workmen, and so it was servants of the contended they must be responsible for their non-removal; but this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal, if they thought him careless or unskilful, did not make him their servant. In Quarman v. Burnett the particular driver was selected by the defendants, but this was held not to affect the liability of the driver's master, or to create any responsibility on the defendants, and the same principle applies here. On these grounds, we are of opinion that this rule must be made absolute.

Rule absolute.

MOFFAT AND POLLOCK. Injury from defective machi-nery, whether faulton pursuer excludes claim.

WHITELAW v. 27th Dec. 1849.—JAMES WHITELAW, Pursuer, against John MOFFAT and ALEX. POLLOCK, Defenders.—D. B. M. 12, p. 434.

> The pursuer, a young lad, was employed at the "Opencast" coal Pit, on the estate of Gartsherrie. The defenders were the contractors for working the pit. The pursuer was engaged at the bottom of the pit, in bringing the hutches to the cage on which the person called the "bottomer" put them in order to their being drawn up to the surface. was a drawing road leading to the bottom of the pit from the workings where the colliers were engaged, and this road rose on an incline from the bottom. Along this road there was a Railway on which the hutches were placed at the top, and sent down the incline so that while a loaded hutch was going down one side, an empty one was coming up the other, the two being connected by means of a common chain, which went round a drum at the head of the The pursuer on the day of the injury was standing at the bottom of the incline when the chain broke, and the loaded hutch which was then coming down, rushed with such rapidity to the bottom, that the pursuer could not get out of the way. He was knocked down by it, his leg was broken, and amputation found necessary. The pursuer's evidence went to shew that the chain used for working the

incline was sometimes broken—was then mended with false MOTFAT AND links, which were very liable to break, was once mended Pollock. Injury from ineven with a rope, was never inspected, and when it broke sufficiency of there were no means of stopping the hutch in its rush down machinery the incline.

pursuer bars damages.

On the other hand, the defenders' evidence went to shew that the chain was more than sufficient for any weight it had to bear, that it had been inspected at stated periods. that the inspection was not so minute as that every link was examined, but the person merely looked along it. When the accident happened the fracture was found fresh and glistening, from which it was argued that no defect could have been discovered prior to the event, and that it was thus a pure accident.

The chain was also in use on the day in question, and was working efficiently, and that often cases of this kind occurred at collieries without the slightest blame on the part of those in charge. The defenders failed in proving an allegation that the pursuer was standing out of his place, and against the rules of the work.

The following issue went to trial: 'Whether the pur-'suer while so employed received severe bodily injuries. 'and whether the said injuries were caused by the negli-'gence of the defenders, by reason of the insufficiency of ' the chain used by them for lowering the hutches in the 'said pit, to the loss, injury, and damage of the pursuer.' Damages laid at £300.

MONCRIEFF, for pursuer, called on the Court to state to the jury as law, that it could form no defence to the defenders for using insufficient machinery, that the pursuer would not have been hurt if he had not been standing out of his place contrary to the rules of the

LORD PRESIDENT.—Charged the jury, and commented on the evidence. He told the jury that the law stated by the pursuer's counsel was correct, so that although the pursuer were out of his place contrary to the rules of the work, and that in consequence of this alone, he was in the position to be struck, yet this was no defence to the masters using insufficient machinery. They were bound to have it sufficient, and if by not having it so, injury resulted to any one, the defenders were liable to make reparation. Verdict for pursuer, damages £50.

Thereafter, the defenders moved for a rule to shew cause why a

WHITELAW v. new trial should not be granted on the ground of the verdict being MOFFAT AND contrary to evidence.

LORD MACKENZIE.—If I had been on the jury I do not think Injury from insufficiency of I would have concurred in the verdict; on the contrary, I frankly machinery whether fault confess I would have gone the other way, but that is not a ground pursuer for setting it aside.

bars damages.

In some similar cases it has been pleaded that the proprietor of works such as this was liable in a sort of warrandice of the machinery. but here there was simply an issue of negligence, it was a mere question of fact, and I do not think the jury have run away with any prejudice against the defenders, for they have given very moderate damages. On the whole, I cannot say that there is either evidence of negligence or very strong evidence of no negligence, but of one thing I am satisfied, that there was no sufficient inspection of the chain; he merely walked along it and looked at it. He did not examine it link by link, so as to be able to say that none of the links were too thin, or otherwise insufficient.

LORD FULLERTON.—Agreed. There was a want of proof of any extrinsic cause to make the chain break. The very fact of the accident throws the presumption against the defenders, who were bound to establish that they took every precaution, and that is the case they have attempted to make. I do not think they have proved it so clearly that the jury were not entitled to come to the verdict they The chain had twice been broken. On one of these occasions it was mended with a piece of common rope. I think that is a circumstance which the jury were fairly entitled to keep in view.

LORD PRESIDENT.—Concurred. The very circumstance that the accident occurred at the bottom of the incline shews that great care and caution was required, and too much care and caution cannot be used in every part of these hazardous works. The inspection was not of the sort to ensure the workmen against all chance of accident, and it is not favourable to the defenders that they did not preserve the false link. I think the damages very moderate, and I find it laid down by high authority, that where another trial would be fruitless or unavailing, and even if the errors of the first verdict were corrected by the second, it was inconsistent with judicial discretion to prolong litigation by granting a new trial.

I agree that this is a salutory lesson to the proprietors of such works, that they are bound not only to protect the lives of their workmen, but that it will be worse for them if they do not preserve

evidence of the way in which these accidents happen.

The Court refused the rule.

Note .- In M'Naughton v. The Caledonian Railway Company, 17 Dec. 1858.—Lord Justice Clerk (Inglis), and Lord Wood, expressed doubts of the correctness of this report as regards the Lord President's charge to the jury.

9th March 1850.—Mrs. Ann Richmond or M'Lean, Pur-Richmond suer, against Russell, Macnee & Co., and Others, Defen-sell, Macne ders.—22 Jur., p. 394.—D. B. M. 12, p. 887.

Non-liabilit proprietor a contractors

Russell, Macnee & Co. entered into a contract with the injury done defenders, Gilfillan and Jackson, joiners, by which they workman (bound themselves to make certain alterations on a tenement in Princes Street, belonging to Russell, Macnee & Co., and to perform the whole work, including the mason and plaster Gilfillan and Jackson entered into a sub-contract with Austin to do the mason work, and into another with Tait to do the plaster work of the job.

It was necessary by the Edinburgh Police Act to get authority to fence in the premises, and to a certain extent in front, for the safety of the inhabitants. Austin obtained a warrant for enclosing part of the street opposite the buildings, and this he did, and caused it to be duly lighted at night. At the end, and outside of the enclosure, Tait the plasterer laid down a heap of lime, which was neither enclosed nor lighted, and the pursuer's husband, while driving a public vehicle along Princes Street after dark ran against the lime, and was violently thrown to the ground, and died in consequence.

The widow brought the present action of damages. Case went to trial on three separate issues as affecting each separate defender, in the following terms, 'It being admitted that the defenders, Russell, Macnee & Co., were in January 1848 the proprietors of the tenement No. 106 Princes Street, Edinburgh. Whether on or about the 17th January 3 848, the pursuer's late husband, Alexander M'Lean, received In Princes Street aforesaid, injuries in his person, which caused his death, in consequence of the fault and negligence of the defenders, or of any person or persons for whom the said defenders are responsible, to the loss, injury and damage ●f the pursuer. Damage laid at £500.' The jury returned erdict for the pursuer, damages £50,—reserving for the decision of the Court the points which have been raised as to the liability of the defenders, Russell and Macnee, and Gilfill an and Jackson.

The pursuer pled,—That all the defenders were liable;

RICHMOND OR Russell and Macnee as proprietors of the tenement, with reM'LEAN J.RUSE
BELL, MACNEE gard to which the work was done, and employers of the
& Co.
Non-lial-lility of two other defenders. The general rule is, that the employer
proprietor and is liable for the party employed. Here the employer reinjury done by mained in possession of the premises, and the whole emworkmen of
sub-contractors ployment was within their observation and under their control. It was for them to see that the work was properly
carried on,—that the lime was properly enclosed, and that if
Russell and Macnee are liable so are Gilfillan and Jackson.

Gilfillan and Jackson pled,—The whole case against them rests on the simple fact, that they were the principal contractors for the work; but the whole ground of liability put in issue is fault or negligence. To make them liable there must be a special culpability on their part, and there is none such here. The principle on which a master is liable for his servant is, that it is his fault if the servant does wrong; he can dismiss the servant at once for disobedience, but a subcontractor does not stand to his principal in the relation of a servant.

Macnee and Russell.—Admitted that a proprietor is not entitled to use his property so as to do harm to others, or expose them to risk. But here, when a party undertook to take the whole work off our hands, it is clear we cannot be liable, unless the fact is brought home to our knowledge as employers, that he, in executing the contract, did so in an With the sub-contractor we could not unlawful manner. But the lime was not on our premises, nor even interfere. on the part of the street which the contractors were entitled to occupy under the warrant of the Paving Board. We never gave any one authority to lay it down there. the contractors transgress this authority are we to be liable? There is no evidence to shew how long the lime had been there, suppose it had been deposited a quarter of an hour before the accident, could we have been liable? The mandate by a proprietor to do certain work, is held a mandate This case is out of the principle of to perform it legally. liability, either on the ground of property, or as between master and servant. The English cases go on principles which we do not recognise, and Bush v. Steinman is not now admitted as authority even in England.

LORD JUSTICE-GENERAL.—I have examined the cases referred to RICHMOND OF on both sides, and have come to the conclusion, that no decree for M'LEAN'V. RUS the damages here awarded ought to be given against any of the par-& Co ties except Tait the sub-contractor. Keeping in view that there are Non-liability of no special circumstances whatever to bring Messrs Russell, Macnee proprietor and contractors for and Company, the proprietors, or Gilfillan and Jackson, the con-injury done by tractors with them, into any immediate connection or contact with workmen of what unquestionably occasioned the fatal occurrence, that the one sub-contractor only directed their premises to be repaired, and that the other entered on its execution with the full sanction of the municipal authorities, their liability for what must be held as the wrongful and negligent act of Mr. Tait, cannot according to our decisions be maintained.

His Lordship referred to Linwood v. Hathorn, as the leading case as to the liability of owners of property, and persons to a certain extent acting under them, and which was approved of by the House of He referred also to the opinion of the Lord Chancellor in Duncan v. Findlater, and of Lord Brougham, indicating that, according to the law of Scotland, a judgment similar to Bush v. Steinman, could not have been given in the Scottish Courts.

'But this very case of Bush v. Steinman is that mainly relied on in the present case for supporting the claim of liability, both of Russell and Macnee, the proprietors, and Gilfillan and Jackson, the contractors. I have perused that ease with all due attention, and I have certainly arrived at the same conclusions regarding it as that of Lord Brougham, and know of no case in which liability has been attached to a proprietor for an accident caused by the negligence not of a contractor with that proprietor for work of his property, nor of a sub-contractor, but of a fourth party, employed by the subcontractor to bring materials, and who had negligently laid them down on a road where an accident occurred. But looking to the various subsequent cases which have followed that of Bush v. Steinman, decided in the Common Pleas at the time of Chief-Justice Eyre, above fifty years ago, and seeing that from the very first its soundness was questioned, and its doctrine greatly limited in the opinion of Chief Justice Abbot (Lord Tenterden), and J. Littledale, and that the same hesitation has been followed by other Judges in the various later cases reported, all of which I have perused, the result appears to me, to be that the authority of Bush v. Steinman is greatly impaired, and that the true state of the law of England cannot be safely held by us as expounded by that solitary decision. shall content myself with quoting only the words of Mr. Baron Parke in his judgment in the case of Rapson v. Cubitt, who concurring with Lord Abinger and Barons Alderson and Rolfe, thus expresses himself where action was brought against contractors for repairing a Club House, and who had a sub-contract with a gasfitter, whose negligence had caused an explosion, to the injury of the plaintiff. "The rule on this subject was laid down by this Court in the case of Quarman v. Burnett, which is directly in point, and cannot be distinguished from the present case. The Court there said, 'The liability, by virtue of the principle of relation of master and servant.

RICHMOND OR must cease when the relation itself ceases to exist, and no other M'LEAN v. Rus- ' person than the master of such servant can be liable, on the simple & Co. MACNEE' ground that the servant is the servant of another, and his act the Non-liability of 'act of another, consequently a third person entering into a contract Proprietor and with the master, which does not raise the relation of master and Contractors for injury done by servant at all, is not therefore rendered liable, and in the case of workmen of 'Milligan v. Wedge, (12 Adol. and Ellis, 737), against the owner of sub-contractors a bullock, who had employed a licensed drover to drive it from Smithfield, and the drover employed a boy, in consequence of whose carelessness the bullock injured the plaintiff's property. J. Cole-'ridge, on the point as to who the person is who did the injury. 'says. 'The true test is to ascertain the relation between the party 'charged and the party actually doing the injury. Unless the re-' lation of master and servant exist between them, the act of the one ' creates no liability on the other. Apply that here. I make no ' distinction between the licensed drover and the boy; suppose the The thing done is 'drover to have committed the injury himself. ' the driving. The owner makes his contract with the drover that ' he shall drive the beast, and leaves it under his charge, and then the 'drover does the act. The relation therefore of master and servant ' does not exist between them.'"

Now such being what I consider to be the true state of the law of England on this subject, I can find no sufficient authority in it for leading us to adopt a principle of liability which can reach the case either of the contractors or those that employed them, and that therefore the pursuer can claim her damages only against Tait, the person who truly was the cause of the injury to her husband.

LORD M'KENZIE.—I am of the same opinion. The liability is not alleged to attach to these defenders on account of any fault or culpa on their part. The only ground of liability is, that the one is the proprietor of the tenement under repair, and the other the principal contractor. It is said that that makes them liable. I am not able to adopt that view. The general rule of our law is, culpa tenet suos auctores. That rule, carried to the utmost extent, would clear matters altogether; but I do not carry it that length. There are some cases, no doubt, in which masters are liable for the acts of their servants. That principle is said to be copied from the Roman law. It is not very accurately copied, for, by the Roman law, the servants were slaves, and the action on account of injury done by them was the actio noxalis: and if the slave was given up the master was free. That principle of liability, however, does exist in our law to a certain extent: I do not say to what extent, but I am certainly not for extending it beyond servants. But then it is said there is a constructive culpa in these parties. I must confess, I am unable to see how any blame can attach to a party for hiring a respectable tradesman to repair his house, or in that person contracting with another to do part of that work. I think there is no principle on which to extend the rule as In Linwood's case servants even were to servants, to contractors. not held liable; and so in the case of Road Trustees, where labourers alone had done the thing complained of, there being no attempt

to bring home personal blame to the Trustees, the House of Lords RICHMOND (assoilzied. On the whole, therefore, I do not think the rule can be SELL, MACNE extended to a case of this kind. No doubt there are cases where it seems to have been carried farther; but they were very special cases. Non-liability

Lord Fullerton.—I am of the same opinion. The question contractors a put to the jury was, first, whether the accident in question occurred injury done 1 through the fault or negligence of the defenders. That question workmen of subcontractor was put as to each of the defenders separately. It is clear that the jury held that the person immediately wrong was liable in damages, for they find Tait liable; but then they reserve the question, whether the others were responsible for him. The question, therefore, is, first, whether the said contractor and employer are to be held liable for wrong done by the sub-contractor. Now, it is to be observed that there was nothing hazardous in what was to be done. a different case. But there was nothing of that here; the repairs of this house were not attended with any hazard. Then it is most important that there is no attempt to question the general character of Tait, or of the principal contractor, as persons perfectly qualified for the work they were to do, and of good character. The question. therefore, as I said, just comes to be, whether the proprietor is to be liable for the contractor, and for the sub-contractors; whether he is called on to warrant the whole operation. Now I do not think there is any principle for extending the liability so far. The case of servants is different. The master is bound to see that they are acting properly. But where there is a bona fide employment of a well-qualified contractor, who again employs another, I do not see that such liability can attach. And that would also appear to be the law of England, for the decision in the case of Bush v. Steinman seems to have been nibbled away by subsequent decisions, till nothing of it But, at any rate, I do not think it would be a sound deci-I cannot think that the employer can be held liable for what was occasioned entirely by the culpa of this third party.

The Court decerned against Tait for £50 of damages, and assoilzied Russell, M'Nee, and Co., and Gilfillan and Jackson.

8th May 1850.—Greenland against Chaplin.— L. J. (N. S.) 19, p. 293.

GREENLAND CHAPLIN.

L. J. (N. S.) 19, p. 293.

Damage by collision of steam ers.— Whether the plaintiff was on board the steamer 'Son of the fault on pur Thames, when a collision took place between that steamer sucr. and the 'Bachelor,' belonging to the defendant. The plaintiff got his leg broken by the anchor of the vessel falling It was said this occurred by the bad stowage of the **₹anchor**, and not directly by the collision, and that plaintiff was in a part of the vessel where he ought not to have

GREENLAND v. been. The jury gave £200 damages. A motion was made Damage by col- for a new trial.

lision of steamers.— Whether fault on pursuer.

POLLOCK, C. B.—The case went to the jury with evidence on both sides. The jury negatived both propositions, and returned a verdict for plaintiff. The motion for a new trial is, that the law I laid down was correct, but the verdict of the jury wrong; and that therefore there ought to be a new trial, on the ground that the verdict is against evidence. I must say that, on the fullest consideration that I can give to the evidence itself, I am not prepared to say that I am dissatisfied with the verdict of the jury; there will, therefore, in this case be no rule granted for a new trial. But I may add that I am of opinion, on consideration, that the law I laid down in this respect was not correct; for I entirely concur with the rest of the Court, that the man who is guilty of a wrong, who thereby produces mischief to another, has no right to say 'part of that mischief would not have arisen if you had not been yourself guilty of some negligence; and I think that, when the negligence did not in any degree contribute to the immediate cause of the accident, negligence ought not to be set up as an answer to the action; and certainly I am not aware that, according to any decision that has ever occurred, the jury are to take the consequences, and decide them in proportion according to the negligence of the one or of the other party. The rule is therefore discharged.

RIGBY v. HEWIT. Reckless driving. 8th May 1850.—Righy against Hewit.—L. J. 19.— Excheq. Rep., p. 291.

This was an action of damages by a passenger in an omnibus, who had been thrown off by a collision with another omnibus. It was directed against the owner of the omnibus occasioning the injury, although not the one in which the passenger had his place. It appeared that both omnibuses were driving at a furious rate, and in trying to avoid a cart in the way, the wheel of the defendant's omnibus, which was driven by his servant, came in contact with the protecting step of the omnibus in which the pursuer was seated, causing it to swing towards the kerb stone; the seat on which plaintiff was sitting was swung against a lamp-post, and threw him off, whereby he was injured.

B. Rolfe, in charging the jury, held that plaintiff was not barred from recovering, mereby because the omnibus in which he was seated was driving at a furious rate; and if the jury thought that the collision took place from the negligence of the defendant's omnibus, so that the other omnibus was not in fault in not endeavouring to Hewir. avoid the accident, then the defendant was liable. The jury found inc. for the plaintiff.

RIGRY #

POLLOCK, C. B.—We are all of opinion that in this case there ought to be no rule, and that there was no fault to be found with the direction of B. Rolfe. The rest of the Court are entirely of opinion that, generally speaking, where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury. On the present occasion, I entirely concur with the Court that there ought to be no rule, and that the direction was perfectly right. am, however, disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences that may be imagined. I wish to guard against laying down the proposition so universally, but this I am quite clear in, that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct.

22d May 1850.—WIGMORE against JAY.—Excheq. Rep., L. J. (N. S.,) vol. 19, p. 300.

WIGMORE v. JAY. Master not lia-

The defender was a builder, employed to build a wing be for injuries to servant causto the hall of the London University, and he constructed ed by defective for his servants and workmen a scaffolding for the purpose state of scaffolding.

C. R. Wigmore was one of the workmen: by other competent servants and it was in the course of their employment, to be on scaffolding at a great height from the ground: that the defendant was bound to keep the scaffolding of sound and safe materials and poles, and to use due care in erecting it, so as to prevent the defendant's servants from falling. That the defendant negligently used an unsound and decaved pole, having notice that the same was unsound and decayed, and the deceased being on the ledger pole, on the scaffolding, in the service of the defendant, the said pole broke, whereby Wigmore was thrown to the ground and killed.

Pollock, C. B.—The action is at the instance of the widow of the workman, for herself and children, to recover compensation in respect of the husband's death, who was killed by reason of the falling of the scaffold on which he was working. The scaffold was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employment

WIGMORE v. of the defendant. C. R. Wigmore not being one of them. Master not lia-ing of the scaffold was occasioned by the unsoundness of one of the ble for injuries ledgers or horizontal poles employed in its construction. The detoservantcaus-ceased was not in a situation to see the defect in the pole, and it did ed by defective state of scaf-not appear that he had seen it. Under these circumstances, it was folding erected contended for the defendant that he was not liable, and Priestly v. by other com- Fowler was cited. The Chief Baron was of opinion, that as the depetent servants fendant had not personally interfered in the erecting of the scaffold, and was not in fault, the plaintiff was not entitled to recover, and ordered a verdict for defendant.

A new trial was moved for, on the ground of misdirection. deceased had nothing to do with the erection of the scaffold, and did not contribute to the accident. He did not see, and was not in a situation to see the defect. He was not a fellow-servant of the party who erected the scaffold—it was the duty of the defendant to keep the scaffolding safe.

The Court refused the rule.

Pollock, C. B.—The Court could not distinguish the case from the case of Hutchinson, nor from the doctrine laid down in Priestly v. Fowler. The person who had erected the scaffold, or assisted in the erection of it along with other servants, was not suggested to have been a person deficient in skill, or an improper person to have been employed on the occasion; and the ground on which the rule was applied for was, that the case of one servant, injured by the negligence of another, in the course of their common employment, was not a ground on which the party or his relatives would be entitled We are of opinion, on a verv to recover damages against the master. full consideration of the case of Hutchinson, which had been delayed for sometime, with the view to give the subject the fullest consideration, that he is not entitled. His Lordship said that the case was upon the record, and capable of being immediately brought to a court of error; and that the case of Priestly derived additional weight from the same circumstance, for it was not a decision of this Court only by the refusal to grant a new trial, but it was the case where the Court arrested the judgment after the verdict; and it does not appear that the parties thought it right, even although a verdict had been obtained, to take it to a court of error.

Rule refused.

THE YORK, NEWCASTLE, AND BERWICK RAILWAY Co. Employer not liable for injuries caused by fault of a fellow-servant.

HUTCHINSON v. 22d May 1850.—HUTCHINSON against THE YORK, NEW-CASTLE, AND BERWICK RAILWAY COMPANY. Law J. (N. S.,) vol. 19. Excheq. Rep., p. 296. Railway Cases. vol. 6, p. 580.

> This was an action under the stat. 9 and 10 Vict., cap. 93. brought by the plaintiff as administratrix of her deceased husband, Joseph Hutchison, to recover compensation from

the Company, on the ground that he had met his death by HUTCHINSON F. THE YORK. reason of the negligence of their servants. It appeared Newcastle, reason of the negligence of their servants. It appeared that And Berwick that Hutchinson was in the Company's employment, and he, RAILWAY Co. at the request of, and in the discharge of his duty as their Employer not liable for infuservant, was a passenger in their railway, and that the en-ries caused by fault of a felgines and carriages were under the government of the low-servant. defendants by their servants in their behalf, and that another train, belonging to the defendants, and under the charge of their servants, came into collision, in consequence of the negligent, careless, unskilful, and improper manner of conducting said train; and the plaintiff's husband suffered injury, and died in consequence.

The defence was, that the fault being charged against the railway servants, and not against any of the defendants. and as said servants were severally fit and competent persons to have the guidance, government, and direction of said engines and carriages, as the deceased at the time well knew, no liability attached. Farther, that the alleged negligence and carelessness of the servants were altogether unauthorised by the defendants, and without their knowledge, sanction, or consent. That the declaration was farther bad in substance. It involved the legal principle as to the liability of a master, when the negligence of one servant causes injury to another servant, upon which Priestly v. Fowler has been the only case decided.

ALDERSON, B.—On the record, the question is, whether the defendants are liable for the injury occasioned to one of their own servants by a collision, while he was travelling in one of their carriages in discharge of his duty as a servant, in respect of which injury they would undoubtedly have been liable, if the party injured had been a stranger, travelling as a passenger for hire. We think that they are not. This case appears to us to be undistinguishable in principle from that of Priestly v. Fowler. That case was fully considered, and the Court, after verdict for the plaintiff, arrested the judgment, on the ground that a master is not in general liable to one servant for damage resulting from the negligence of another; and some of the inconveniences, not to say absurdities, which would result from a contrary doctrine were there pointed out. The principle on which a master is in general liable for accidents resulting from the negligence or unskilfulness of his servant is, that the act of his servant is in truth his own act. His Lordship then explained, that the principle did not apply when the servant is himself injured by his own unskilfulness or negligence. He proceeded to explain the difficulties as applicable

HUTCHINSON v. to the case of several servants employed by the same master, caused THE YORK, NEWCASTLE. by the negligence of any of them, and stated, that the Court were of vant.

AND BERWICK opinion, that in general the master is not responsible, and proceeds: RAILWAY Co. Suppose that, by the unskilfulness of A. B., the other servant is in-Employer not in in incident in liable for in- jured while they are jointly engaged in the same service, there we juries caused think B. has no claim against the master; they have both engaged by the fault of in a common service, the duties of which impose a certain risk upon fellow-ser- each of them, and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew when he engaged in the service that he was exposed to the risk of injury, not only from his own ' want of skill or care, but also from the want of it on the part of 'his own fellow-servant also, and he must be supposed to have 'contracted on the terms that, as between himself and master, he ' would run that risk. Now, applying these principles to the present ' case, it follows that the plaintiff has no title to recover. 'son, the deceased, in the discharge of his duty as one of the ser-'vants of the defendants, had put himself into one of the railway ' carriages, under the guidance of others of their servants, and by ' the neglect of those other servants, while they were engaged to-'gether with him in one common service, the accident happened. 'This was a risk which he must be taken to have agreed to run when 'he entered the defendants' service, and for the consequences of 'which, therefore, they are not responsible. The pursuer, no doubt. states that the accident happened by the neglect of the servants 'who were managing the other train; but it was argued that, 'although the principle applied to the servants managing the train 'in which Hutchinson was, still the principle would not apply. 'so as to exempt the defendants from liability for the acts of those ' who, though equally with Hutchinson servants of the defendants, ' were not, at the time of the accident, engaged in any common service ' with him.' But we do not think there is any real distinction between the two cases. The principle is, that a servant, when he engages to serve a master, undertakes, as between himself and the master, to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow-servant when he is acting in the ordinary discharge of his duty as servant to him who is the common master of both. The death of Hutchinson appears, in these pleadings, to have happened while he was acting in the discharge of his duty to the defendants as his master, and to have been the result of carelessness on the part of one or more, other servant or servants of the same master while engaged in their service; and whether the death happened from mismanagement of one train or the other, or of both, does not affect the principle—in any case it arose from carelessness or want of skill, the risk of which the deceased had, as between himself and the defendant, agreed to run. It may, however, be proper, with reference to this point, to add, that we do not think that a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, when the servant injured was not, at the time of the injury, acting in the service of his master. In such a

Case the servant injured is substantially a strarger, and entitled to all Hutchinson the privileges he would have had if he had not been a servant. It The You Newcast was contended that the plea in this case is bad on special demurrer, AND BERN as being but an argumentative denial of the cause of action stated in RAILWAY
the designation but me think the chiestion is unfounded. Though Employer the declaration, but we think the objection is unfounded. Though hable for we have said that a master is not responsible generally to one servant ries cause for any injury caused to him by the negligence of a fellow-servant the fault fellow-ser while acting in one common service, yet this must be taken with the qualification, that the master shall have taken care not to expose his servant to unreasonable risk. The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care; and the real object of the plea in this case is to shew that the defendants had discharged a duty, the omission to discharge which might have made them responsible to the deceased. The plea, therefore, is not open to the objection. For these reasons, we are of opinion that the plaintiff has shewn no ground of action. Judgment for defendant.

1st July 1851.—Adam Paterson, Pursuer, against Monk-Paterso Monkla LAND IRON AND STEEL Co., Defenders.—D. 13, p. 1270, IRON A. 23 Jur., p. 598.

Coal-pit &

This was an action of damages for injury sustained by valcy to i liability the pursuer, while engaged as a collier in the employment master. of the defenders. It appeared from the statements in the summons, that the pursuer was in the act of being drawn up the shaft, and while standing in it at the bottom, along with three other men, the engineman had been altering the length of the windlass-rope at the mouth of the other division of the shaft without the knowledge of the persons at the bottom, and that instead, as it was alleged, of adopting the usual mode of altering it by 'packing' or 'unpacking' the 'pirn' or cylinder round which the rope is coiled, in order to lessen or increase its circumference, he, from hurry or carelessness, proceeded to make an alteration by attaching a chain of different length from that then in use to the end of the windlass-rope—and that while so employed he suffered a bolt to fall into the shaft, which glanced from the side, and in consequence of the incompleteness of the partition, went down the division of the shaft, at the bottom of which the pursuer was standing, and struck and

MONKLAND Iron and STEEL Co. Coal-pit acci-dent.—Irrelevancy to infer liability master.

PATERSON v. severely injured him. The pursuer alleged, that these events took place through the negligence, fault, and culpability of the defenders, and their underground manager, in keeping the pit in an unfinished state, and the partitions not completed after their danger had been pointed out. and not having the cage properly covered in, and the carelessly altering the windlass-rope in an unusual and dangerous manner. The defenders pled, that the pursuer could not recover for an injury sustained through the fault or negligence of a fellow-workman, and in so far as it proceeded on that ground it was untenable. The following issue was proposed by the pursuer—'Whether the said injuries were 'caused in consequence of the imperfect condition of the ' shafts of the said pit, or of the faulty construction or in-' sufficiency of the cage or other machinery provided and ' used by the defenders, or others acting for them, for the ' purpose of enabling their workmen to descend and ascend 'the said shaft, or by the fault, negligence, or want of skill of the defenders, or others acting for them, in the use or ' management of the said machinery, to the loss, injury, 'and damage of the pursuer.' The Lord Ordinary reported the case.

> LORD JUSTICE-CLERK.—The question raised, is one of great importance, but I don't think we are called on to decide it, for it appears to me that no relevant ground of action is stated in the summons. The liability of the defenders, as I understand the summons, is rested on the fault or negligence of the defenders, or their servants, on three points-1st, In not having the cage covered, so as to prevent injury to persons therein from anything falling down the shaft; but I am sure the greater number of coal-pits in Scotland have no such covering to their cages, and it is impossible to make the defenders liable on that ground. The same may be said on the second point, namely, the not completing the partition wall to the top, and so in the course of discussion, both these grounds of liability were given up. Then the case just comes to this; that a bolt was dropped down the shaft, by which the pursuer was injured. But, on looking at the statement on that point in the summons, it is impossible to say it is a statement of anything but an accident; no relevant ground of liability is set forth. The summons is not expressed in such terms as can entitle a court of law to interfere in any way; for the whole statement is that of an accident, from which no legal liability arises against the defenders.

LORDS COCKBURN and MURRAY concurred.

Defenders assoilzied with expenses.

1851.—Knight against Fox and Another.— 5 Exch. Rep. 721.

KNIGHT v.
Fox, &c.
Master not
liable for faul
of contractor

The London and Blackwall Railway Company, had entered into a contract with Brassey, to complete certain works Brassey sub-let part of this contract, being on their line the erection of a tubular bridge over a public highway, to the defendants, who carried on business at Birmingham, but employed Cochrane at a yearly salary of £250, to manage their general business in London. The defendants entered into a distinct contract with Cochrane, to supply the scaffolding for the bridge for the specific sum of £40; the defendants finding the rest of the materials, and also the lights to warn passengers. During the construction, one of the poles of the scaffolding rested on the pavement of the highway, and projected, while there was only one light placed at night to guide passengers. Owing to the defective light, the plaintiff one night stumbled over the projecting pole. and broke his leg, and immediately after, the defendants added On this state of facts the defendants objected more lights. that they were not liable, but that Cochrane, if any, was so. Pollock, C. B., at the trial told the jury, they would not be justified in finding a verdict for the plaintiff, and directed a non-suit, but with leave to move the Court to set it aside On moving accordingly, Knowles, Q. C., for if they chose. plaintiff, contended, that as Cochrane was the general servant of the defendants, the agreement with respect to the £40, was like advancing him that sum for the purpose of some machine required for the works. Suppose a master were to contract with his servant, that the latter should murchase his own tools, and the servants carelessly placed them in a dangerous position, whereby injury was caused to passer-by, the master would be liable. Besides, the fact of defendants placing additional lights after the accident. was some proof of their liability.—Burgess v. Gray, 1 Com. Bench Rep. 578. Held by the Court, the defendants were ot liable. Parke, J. said—' In the management of the erection and fitting up of the scaffold, Cochrane was not the defendants' servant. It is like the case of a gentleman who enters into a particular and distinct contract with his

KNIGHT v. Fox. &c. Master not of contractor.

- 'servant to supply him with job horses. It may be too ' much even to say that Cochrane was defendants' servant liable for fault in any point of view, for he acted as a contractor or sur-'vevor for them at a yearly salary, which he received in ' lieu of payment for each separate piece of work.
 - 'cisely the same as if he had been a third party.'

SEYMOUR v. MADDOX. Accident in falling through stage traps.

SEYMOUR against MADDOX.—20 Law J. (Q. B.) 273.

Plaintiff, an actress, had been engaged to sing in an opera, and while passing from the stage in the usual way to the drawing-room after the performance, fell through a trapdoor that was open, and was injured. She sued the proprietor, alleging it was his duty to have kept such holes sufficiently lighted and guarded, which duty he denied. Court gave judgment for defendant.

COLERIDGE, J.—The real question is, whether the duty arises from the relation in which the parties stood. It seems to me, if we were to hold that it did, the consequence would be, that whenever the same relation existed we would have to infer duties that had never vet been held to exist. The servant is not bound to enter the master's service, but if he does, and he finds things in a certain state, he must take the consequence, if any, that may occur owing to such a state of things.

OVERTON v. FREEMAN. Principal contractor not liable for injury caused byworkmen of a subcontractor.

13th January 1852.—Overton against Freeman.— 21 Law J. (C. P.) 52.

This was an action of damages by plaintiff, who had broken his leg by stumbling on paving stones left negligently on the street. Defendant had contracted with a sub-contractor to lay down the pavement, and the latter was doing so under the direction of the engineer and surveyor of certain Commissioners, who had, in the first instance, contracted with the defendant for the work. sub-contractor himself paid the men who actually laid down the stones, which caused the injury. No lamp having been placed near the stones, the plaintiff, when passing

along the street in a dark night, stumbled and hurt his leg, FREEMAN.

which had to be amputated.

Principal contractor not lie-

Defendant contended he was not liable, but the plaintiff ble for injury contended that defendant was liable, because the act was a caused by work-public nuisance. The Court held defendant was not liable contractor.

CRESSWELL, J.—The defendant not having exercised any personal interference in the work, not having sanctioned the placing of the stones, but only having contracted for a lawful thing, cannot be made liable for the unlawful act of the person with whom he contracted. The defendant did not contract that the sub-contractor should lay one stone upon another, so as to create a public nuisance. Paving the street was not a public nuisance. If he had contracted that a public nuisance should be committed, it would be another thing.

21st February 1852.—Blake against MIDLAND RAILWAY BLAKE v. MID-COMPANY.—21 Law J., Q. B., 233.

LAND RAILWAY
Co.
Excessive damages. Scotch

Plaintiff's husband had been killed by an accident on the law of assyth-The ment repudiatrailway, caused by the negligence of the defendants. jury awarded excessive damages to the widow, who was plaintiff, giving her £4000, and a new trial was moved for on this ground, and also because the Judge had not directed the jury how to estimate the damages. Plaintiff contended that a certain sum by way of solatium was authorised by Lord Campbell's Act (9 and 10 Vict. c. 93), and cited cases from Scotch reports, to shew that that principle prevailed in Scotland. The Court granted a new trial, per Coleridge, J.—'The Scotch law of assythment is wholly alien to the 'law of England. Lord Campbell's Act may have been 'suggested by that law, but did not introduce it here in its The Judge at the trial ought more explicitly 'full latitude. 'to have told the jury, that in assessing damages they could 'not take into consideration the mental suffering of the The damages awarded certainly exceeded any 'loss sustained by her, admitting of a pecuniary estimate, 'and must be considered as excessive.'

RANKIN OF NEILSON v. WM. DIXON. Damages for injuries received at a coal pit—imperfect machinery and negligence of fellow-servents.

31st January 1852.—RANKIN or NEILSON, Pursuer, against WILLIAM DIXON, Defender.—Jurist, vol. 24, p. 184, D. 14, p. 420.

The pursuer, Ann Rankin or Neilson, claimed damages regligence of negligence of a coal-pit, for the death fellow-servants from the defender, as proprietor of a coal-pit, for the death of her husband. Thomas Neilson, who was a workman in the employment of the defender. The action had originally been brought before the Sheriff-Court of Glasgow, and judgment was given for the pursuer. The defender brought an advocation of the judgment, and pled that the death had been occasioned partly by the negligence of the deceased, and partly by the negligence of his fellow-workmen, and contended that a master was not liable to a workman for injury caused by the negligence of his fellow-workmen—that being a risk undertaken by the workman in his contract of employment. Parties were at variance as to the facts, and a proof had been taken in the case before the Sheriff. following interlocutor of the Lord Ordinary (Colonsay), brings out the nature of the case:—'Finds, as matter of fact—1. 'That on or about the 5th April 1849, on the occasion 'when the deceased Thomas Neilson, the husband of the ' pursuer, lost his life, he was, upon the invitation or with ' the sanction of those for whom the defender is responsible. 'occupied in the business of the defender, in working along ' with other men a fixed machine or engine, called a 'crab,' ' placed near the mouth of a coal-pit, called the 'Big Bank "Pit,' belonging to the defender: 2. That the said machine ' was of the nature of a vertical circle made to revolve by ' the application of manual power to horizontal spokes, and ' was used for the purpose of raising and lowering with a 'rope and pulley, weights from and into the said coal-pit, 'but was not provided with any working teeth or checks ' to prevent a reverse movement in the event of the force ' being withdrawn or relaxed while the weight was still in ' suspension. 3. That on the occasion in question the crab ' was used for the purpose of raising the rods of the pumps ' in the pit to a certain height, and keeping them suspended ' while certain operations were in the course of being per-' formed on the pumps by changing the buckets—that the

' said rods were of great weight, and the united continued RANKIN or force of a number of men was required to raise them, and Wm. Dixon. 'keep them suspended—that in consequence of the loss of Damages for injuries re-'a bolt and nut, the weight was kept suspended until ceived at a coal measures were taken by sending to the smithy to get the machinery and bolt and nut supplied, which occupied a considerable time negligence of fellow-servants -and thus the weight was kept suspended for a great **d** length of time. 4. That in the meantime, and in order ★ that the men might be relieved for a time from sustaining. The weight, and that any reverse movement of the crab might be at the same time prevented, one of the men engaged in working the crab, tied it by one of the spokes with a rope, which then, and usually, was attached to one of the upright standards of the crab; and several of the men thereupon left the crab and removed to a short distance, but the deceased and two others remained at the 5. That the three men who remained at the crab. could not unaided have sustained the weight, and that the rope with which the crab was tied, was old and slender, unsuitable for that purpose, and insufficient to sustain the strain, and that it gave way, and the crab, impelled by the great weight of the pump rods, revolved with great force and rapidity, whereby the deceased was thrown down and his legs were broken, and he was otherwise injured, and soon thereafter died of the injuries so received. * at the time when the crab was tied, and when some of the men released themselves from the crab, and when the injury occurred, William Robertson, the pit-head man who had been in charge, had left the spot, and had gone to the smithy about the bolt, and was absent for a considerable time, and the overseer, James Galloway, who had desired Robertson to go to the smithy, was in the engine-house at a short distance, warming and drying himself, and there was no person on the spot having authority or taking charge of the operation of working the crab, or of the party of men engaged in that operation. 7. That the practice of tying the crab, with the said unsuitable rope, when weights were suspended, instead of the men continuing to sustain the weight by their own power, had prevailed at the Big Bank Pit for a considerable time, and to a considerable extent, and the propensity of the men to do

RANKIN OF NEILSON v. WM. DIXON. Damages for injuries repit-imperfect

'so, was known to the pit-head man, and had been re-' peatedly evinced in his presence, and was that day evinced ' in his presence, unchecked by him, and was also known to ceived at a coal, the overseer, and the insufficiency for that purpose of the machinery and rope attached to the upright shaft of the crab and the negligence of fellow-servants' danger of the practice were also known to them. reference to the cause of the loss of life there was no blame 'imputable to the deceased, but that there was negligence 'and want of due precaution and care on the part of the ' defender, or those for whom the defender was responsible. ' inasmuch as proper precaution and care were not taken to ' prevent the known danger consequent on a reverse move-'ment of the crab, by seeing that sufficient force or power ' was applied during the whole continuance of the protracted 'operation: and inasmuch as all superintendence was im-' properly withdrawn during a critical period of the opera-' tions, notwithstanding the knowledge of the propensity to ' tie the crab with the rope which was attached to the up-' right standard, and of the practice which had prevailed of ' doing so, and of the unsuitableness and insufficiency of the 'rope for that use, and the danger attendant on such a pro-' ceeding,' The Lord Ordinary, therefore, sustained the claim, and assessed the damages at £100, with expenses.

The defender reclaimed, and the Court pronounced the following judgment:—' Recall the 4th and 6th findings of ' the Lord Ordinary's interlocutor, and in lieu thereof find: '4. That in the meanwhile, and with a view to relieve for 'a time the men from sustaining the weight, and that any ' reverse movement of the crab might be at the same time ' prevented, one of the spokes was tied with a rope, which ' then and usually was attached to one of the upright stand-'ards of the crab, and several of the men thereupon left the 'crab, and removed to a short distance, but the deceased ' and two others remained at the crab: Find, 6. That either ' before or after the crab was so tied, and when some of the 'men released themselves from the crab, and when the in-' jury occurred, William Robertson, the pit-head man, who had been in charge, had left the spot, and had gone to the 'smithy about the bolt, and was absent for a considerable ' time, and the overseer, James Galloway, who had desired

- Robertson to go to the smithy, had gone to the engine-RANKIN or NEILSON v.
 house, at a short distance, warming and drying himself, Wm. Dixon.
- thus withdrawing himself from any further control or in-Damages for spection of the men at this critical stage of a most hazard-ceived at a coal
- spection of the men at this critical stage of a most hazard-ceived at a coal pit—imperfect ous operation, and there was no person on the spot having machinery and
 - 'authority or taking charge of the operation of working the negligence of crab, or of the party of men engaged in that operation.
 - 'Quoad ultra, adhere to the findings of the Lord Ordinary's 'interlocutor, and assess the damage at £100.'

THE LORD JUSTICE CLERK (HOPE) in moving an adherence said. that the case is of importance, only from the novel defence in point of law, by which the defender seeks to relieve himself from all liability for damages, in any view which may be taken of the facts. The operation in question required to be performed in order to put the pumping machinery in order, and it was known to be an operation calling for great manual power, and much attention and care in the direction of the men, and in the management of the order, owing to the imperfection so far as regards the safety of the men. It appears that, with that disregard for the safety of workmen which seems eminently to characterize all the machinery management and operations in a great number of coal and other pits, this crab has no teeth or checks to prevent a reverse movement, and that is said to be a common defect. I do not say that in this case I hold the master liable in damages, on account of the great defect in the machinery of the crab. But this case will make the importance prominently known of having a proper check to prevent the same flying round with the frightful violence here caused by the weight of the rods, and if after such occurrences, coal masters will go on with such defective machinery, whether from carelessness in themselves and their managers, or from a desire to save a little expense, I shall certainly in future leave any such point to the jury if a case is tried before me, as carelessness and detect for which the master is at once liable. But in the present case there is no doubt, that the risk of the machine revolving with great rapidity, and the spokes thus flying round in a most dangerous manner, was palpable and most notorious, so when any weight had to be suspended for a considerable time, and that risk only prevented by great care and caution, the master or his manager on the spot, ought to have looked to the safety of the men, whose lives might have been endangered by the slightest relaxation of the strength required to sustain the weight in its position. The men employed on such an occasion as we see here, are any of the workmen who can be got, or any one casually present. It is of no avail to say that the men knew the risk, and ought to have held on, or that they have been told to hold on. This was just the defence in the case of Sword. The recklessness of danger on the part of the men is a result of the trade in which the master employs them, and he is bound in all such cases to have superintendence which will ex-

RANKIN OF NEILSON V. WM. DIXON. Damages for injuries received at a coal pit—imperfect machinery and negligence of fellow recovery

NEILSON v. WM. DIXON. Damages for machineryof fellow-servanta.

clude such risks as occurred here, especially, and peculiarly when his machinery is defective, in not having the checks which exclude any reasonable chance of danger. The occasion called for most strict injuries receiv- and vigilant attention, and it was not given. Even if Galloway went ed sta coal-pit, away before the rope was tied, and although it was natural he should desire to warm himself, yet the fact is, he did not look after this most and negligence critical and dangerous state of the machinery at all. That the rope was utterly unsuitable and insufficient for this use, the reclaimer himself founds on. Assuming therefore that it is not necessary to decide that Galloway himself tied the spoke with the rope, still in an operation of great risk, carried on for the master's interest, and which required to be gone through without delay, in order to prevent loss to the master, and at a most critical stage of that operation attended with the greatest danger, and protructed for the master's interest to a most unusual length of time, there was a complete want of care. superintendence, and control over the actions of the men, all authority and inspection being withdrawn, so that the very risk occurred which often took place in circumstances of less danger, and which the slightest attention to the safety of the men would have prevented, such inspection and control being withdrawn too over a body of men accidentally brought together, some strangers to each other, and to those in charge, and on whom therefore it was extremely necessary that most vigilant inspection, should have been preserved. By this want of control the man in question remaining at the spoke was killed. I am of opinion that the master is clearly liable in the circumstances for this inattention and want of control and inspection in the course of a hazardous operation, protracted in this instance for a considerable and an unusual length of time, whereby the necessity for very great and vigilant inspection was essentially required.

But then it is said, entirely on the force of certain decisions and opinions of the Courts of England, that the master is not responsible as I understand in any circumstances to those employed by him. for any injuries caused by the carelessness, inattention, and recklessness of other servants in his employment. That there are many cases in which the master will not be liable for the conduct and acts of his servants, whether the injury is done to a third party, or to another servant, as being at the time in his master's service, is quite true, but such exceptions-for such they are-in the law of Scotland, depend on the state of the facts and the nature of the misconduct in the particular These exceptions will cover some of the extreme cases put in the English opinions, while others of these cases seem to apply to the master's liability to third parties. I observe that the English judges state that by the principles of the law in that country, the servant by reason of the contract, undertakes to run all risks while in his master's service -of all injuries caused by the recklessness, wrongous acts, and carelessness of his fellow-servants, for the dangers from such are risks incident to the labour he undertakes in that particular service, as for instance, the servant of a railway company by his contract of service, undertakes to run the risk of all the dangers caused by other servants of his employers, such dangers being a risk incident to the service he undertakes; of course this doctrine implies that all along, and as to this most common contract, this had from the beWM. DIXON. ginning of time, been the risk undertaken by the servant by his con-Damages for tract of service. I am glad that our law is different, for I should injuries receivthink that if you relieve the railway company from all obligations for —imperfect injury caused to any of their servants through the carelessness and machinery neglect of any of their numerous servants, you incur the hazard of and negligence their being as regardless of the safety of the public from the conduct vants. of their servants, as the law tells them they may be as to the safety of their servants.

By the law of Scotland, the master's primary obligation, in every contract of service in which workmen are employed in a hazardous and dangerous occupation for his interest and profit, is to provide for and attend to the safety of the men. That is his first and binding I should say paramount, even to that of paying for their obligation. This objection includes the duty of furnishing good and sufficient machinery and apparatus to enable them with safety to their lives to perform the work which they are employed in for his profit, and to keep the same in reasonable and good condition. his obligation is equally included, as he cannot do everything himself, the duty to have all acts by others whom he employs done properly and carefully in order to avoid risk. The obligation to provide for the safety of the lives of his servants by fit machinery is not greater or more inherent in the contract than the obligation to provide for their safety, from the acts done by others whom he also em-The other servants are employed by him to do acts which. of course, he cannot do himself, but they are acting for him, and instead of himself, as his hands. For their careful and cautious attention to duty, for their want of vigilance, and for their neglect of precautions by which danger to life may be caused, he is just as much responsible as for such misconduct on his own part if he was actually working, or present, and this particularly holds as to the persons he entrusts with the direction and control over any of his workmen, and The servant then in the conwho represent him in such a matter. tract of service in Scotland, undertakes no risk from the dangers caused by other workmen, from want of care, attention, prudence, and skill, which the attention and presence of the master or others acting for him might have prevented. His master is bound to him in obligations, which are to protect him from such dangers. The principle of the contract in England being different, of course different results follow. Of course there arise a number of cases in the various trades of modern society, in which the acts of the servants may be of such a kind that although not criminal, they do not yet involve the master in liability, and in such cases the law was clearly admitted on all hands, although its application was matter of nicety. of Sword v. Cameron, February 13, 1839, is a case which eminently and very strongly brings out the doctrine of the law of Scotland. It is in vain to attempt to disturb it in this Court, and having heard what is to be advanced, I have only to say that I shall not regard the point as again open for argument. It seems to me to be clear that this plea is quite inconsistent with the settled law, that a master is liable

RANKIN OF NEILSONIV. WM. DIXON. Damages for machineryof fellow-ser-

to his servant for injuries caused by culpable negligence and inattention of his other workmen, and the want of control over their men.

LORD MEDWYN.—I cannot help entertaining a doubt of the coninjuries receiv-clusions in point of fact deduced by the Lord Ordinary. ed at a coal-pit and 10th articles of the summons, attribute the tying of the crab by the rope to Galloway, and in the face of representations of its insuffiand negligence ciency by others, as well as of proof of its insufficiency at the time. I think it proved by Galloway, Armstrong, and Robertson, that Galloway gave no other orders, but for the men to hold on, which implied that they were not to tie the crab. Now when Neilson received his death blow, was he employed in his master's service, doing his work. so as to make him answerable for the injury his family have sustained by his death? I have great doubt about this. He was acting contrary to express orders, and why did he remain by the crab not holding on, but merely leaning lounging in it, instead of running away from it, remaining subject to injury if the rope gave way. have removed from the danger which he occasioned by disobedience of express orders. He had no occasion to remain where he did, for the benefit of his master. I say nothing as to English cases, or the case of Sword.

> LORD COCKBURN.—Agreed with the Sheriffs and the Lord Ordinary in their view of the facts. The result is that the pursuer's husband lost his life through blameable negligence on the part of those for whom the defender is liable, 'But it has been maintained, and this is the only singularity in this case, that, as the deceased was himself a workman at this colliery, and was injured through the culpable misconduct of other workmen there, the defender, who employed them all, is not liable in damages. This plea rests solely on the authority of two or three very recent decisions of English Courts, and these decisions do certainly seem to determine that in England where a person is injured by the culpable negligence of a servant, that servant's master is liable in reparation, provided the injured person was merely one of the public; but that he is not so responsible if the person injured happened to be a fellow-workman of the delinquent It is said, as an illustration of this, that if a coachman kills a stranger by improper driving, the employer of the coachman is liable, but that he is not liable if the coachman only kill the foot-If this be the law of England, I speak of it with all due res-But it most certainly is not the law of Scotland.

> LORD MURRAY.—I have considered this case with great anxiety and have at different times been impressed with different views, both of the evidence and of the law. I am now of opinion that we must entirely discard the doctrine from the English law, on which the advocator has relied. I hold it to be clear in our law, that when any one employs workmen in a manufactory or other operation attended with danger to life, he must take every precaution to make the employment as safe to the workman as possible. He is responsible for the machinery being safe, and for the superintendence and vigilance on the part of other workmen to make it so. I think it made out by the evidence that the requisite superintendence was not given here.

I am therefore for adhering.

3d March 1852-1855.—Mrs. MARGARET BRYDON or MAR-BRYDON or MARSHALL, &c. SHALL and Others, Pursuer, against the Omoa and Cle-v. Omoa and Land Iron and Coal Co., and Robert Stewart, Defen-& Coal Co. and H. of L. Jur. ROBERT STEWders.—Jur. 24, p. 298, D. 14, p. 596. 27, p. 321.

James Marshall, a miner, in the employment of the Omoa the miner was at the time do-and Cleland Iron and Coal Company, and Robert Stewart, ing the work of the only individual partner; or otherwise, of the said Ro-as to cause liabert Stewart as proprietor, and in the occupation of the bility. Cleland Colliery, and the Omoa Ironworks, was killed on the morning of 11th January 1849; and his widow and children pursued for damages, averring that he, while in the performance of his duty as a miner in the employment of the defenders or defender in the Bellside pit, and while ascending the shank in a cage, provided for the use of the miners, was struck on the head by a lump of coal, ironstone. or other hard substance falling on him from above, in consequence of which he fell from the said cage to the bottom of the said pit, and shortly afterwards died from the injuries The shank was not provided with a cover, so as to protect those ascending and descending in it from being injured by anything falling from above. The under part of the pit or shank is composed of solid rock, but the upper part, to the extent of eight fathoms from the top thereof, was composed of soft or loose metals, and the upper part had been lined or defended with wood, so as to prevent the soft or loose metals from coming out and falling down the shank; and it was alleged that, at and previous to Marshall's death, the lining of the upper part of the pit was in a rotten, or at least an unsafe and insufficient state, and that the substance which killed Marshall fell in consequence. The ground of liability, by reason of the cage not being covered. was abandoned, in consequence of the decision in the case of Paterson, (1st July 1851,) and on the second branch, the following issue for trial was adjusted:—'Whether the death of ' James Marshall, miner at Bellside, while working in a coal 'pit belonging to and in the occupation of the defender, 'was occasioned by injuries arising from the shaft of the ' said pit being in an unsafe state, from causes for which the

Damages for injury in a coal at the time doBRYDON or 'defender, as the employer of the said James Marshall, is v. Omoa and 'responsible?'

CLEARD IRON
& COAL Co. and
The defence was, that at the time of Marshall's death
ROBERT STEWthere was, so far as the defender was concerned, nothing
Damages for wanting to make the pit in all respects proper and safe for
niury in a coal
pit,—whether working in. At the time, and for a considerable time prethe miner was vious thereto, the defender had contracted with John Craig,
ing the work of a person of sufficient skill or capacity to maintain the pit,
as to cause lia- including the underground roads and works, in a proper
bility.

condition, and also to draw the minerals and other mate-

condition, and also to draw the minerals and other materials which required to be taken to the surface, from the places at which they were wrought to the pit bottom, and put them in the ascending hutches. That on the occasion of the deceased falling down the pit, he was in the act of leaving his work when he had no right to do so. The defender, from all he can learn, believes that the death of James Marshall is attributable either to his own carelessness, or was the result of an inevitable accident.

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It appeared from the evidence, that the miners at the pit had, after going down, on the morning of the 11th of January 1849, held a meeting, at which some alleged grievances were discussed, and it was resolved that all the miners should that day stop work, in order to make the complaint tell stronger; and the miners accordingly proceeded to leave the pit, and Marshall, one of the number, in doing so, was killed in manner above stated. At the trial, the presiding judge charged the jury, (1st), That if they were satisfied that the men left the mine without working, from no apprehension of danger, but of their own accord, for a purpose of their own, against their employer's interest, and in a body. to make some complaint tell more effectually with the manager or the defender, and not in the ordinary course of their occupation, then, in point of law, the defender is not answerable for a casualty caused by a single stone falling at that particular moment, when the men were so leaving, and that the jury must, if so satisfied in point of fact, find for the defender, and state their ground for doing so, even if they should be satisfied that the death was caused by that stone or other substance falling on the deceased, through some insufficiency in the planking. (2d), Whether the death was caused in the manner contended for by the pur-BRYDON or MARSHALL, &c. suers, in consequence of the shaft being in an unsafe and v. Omoa and insufficient state; and if they think so, they will so find, & Coal Co. and and find damages due, as the defender, in point of law. is ROBERT STEWresponsible for the death, if so caused, and if not relieved Damages for on the first ground. And (3d), If the jury think the death pit,—whether was caused by the shaft being in an unsafe and insufficient at the time dostate, then the jury will farther consider, and find whether ing the work of the master, so John Craig was, in point of fact, properly a contractor, or as to cause liatruly a servant, paid for his labour, in regard to the lining bility. of the shank in a particular manner, convenient for his master. And the judge reserved to the parties right to move the Court to enter up the verdict for them on the ground of the charge being wrong in point of law, or any part of it as being a question of law for the Court, notwithstanding the verdict of the jury. The following verdict was returned:-'On the first point they find for the defender, and that the 'men had no proper cause of leaving their work. ' second point, they find that the pit was not in a safe and 'sufficient state, and that the death arose from injuries 'thereby caused; and in terms of the joint minute lodged 'for the parties, they assess damages at L.150, being 'L100 for the widow, and L50 for the children, of the ' deceased James Marshall. On the third point, they find 'that Craig was not a proper contractor, but properly a ' servant of the defender.'

The pursuers now moved the Court to enter the verdict for them, and maintained that the first direction was wrong in point of law. The deceased was not violating any rule of the work, although he ascended for a purpose of his own. Suppose it was to complain of a grievance—it might be that it was a grievance against which he was entitled to The verdict, though it found that the cause for which he left his work was not a proper cause, did not find that it was an unlawful cause. The defender, on the other hand, maintained the correctness of the direction.

LORD JUSTICE-CLERK.—None of the cases adverted to appear to me to advance the pursuer's argument. 1. All but the case of Whitelaw were cases where strangers were injured, and where no question arose out of the relation of employer and servant : hence they have

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Brypon or no application. MARSHALL, &c jured party, on which the defender could found any defence. at the time do-defender.

CLELAND IRON pose that, in Cadell's case the man had been coming home drunk. & COAL Co. and or riding a wild horse, these were all facts against which the owner ROBERT STEW- was bound to guard in the duty he owed to the public, duly to fence Damages for the mouth of an old coal pit close to an open road, having no fence injury in a coal on either side of it. Hence the fault imputed to the individual in pit,—whether the miner was all these cases, was not one which bore on the responsibility of the But holding that the cases do not aid the pursuer, still ing the work of there remains the undoubted and most important obligation on the as to cause lia-employer, to have the shanking of his pit at all times safe and sufficient, to prevent danger to the workmen; and the question is, whether the direction is sound which directs the jury, if certain facts are proved not to draw from a casualty arising from the insufficient state of the planking, the liability which would otherwise arise. I thought the question a very nice point at the trial, and I have since entertained the strongest doubts of the soundness of the direction. haps I entertain the more doubt, as it is a direction by myself. find, however, that two of your Lordships think, on deliberate consideration, that the direction is correct in reference to the special facts to which it was applied; and, with the deference due to these opinions, I have, on the whole, come to the conclusion that it is the most safe and correct application of the principles of law as to an employer's responsibility. But this, solely in reference to the special nature of the facts, proved a state of facts so very special, that one can hardly suppose that this case can be a precedent of use in other

> LORD MEDWYN.—What is the deduction in point of law, from the findings in fact of the jury on the first point? If, by finding for the defender, they affirm the facts noticed in the direction, with the additional observation, that Marshall had no proper cause for leaving the work at that time, is the employer responsible for the accident? This is a case of novelty, and of considerable nicety, but it is one which I have had already to consider; and I had occasion, not very long ago, to express an opinion on a similar case, where I thought that the employer could not be held responsible for any accident to a workman, unless it was while he was in the execution of the work of his employer, and done according to and not against his orders. It was the case of Neilson v. Dickson. The view I took of the facts from which this plea arose was not in accordance with the opinion of the rest of the Court, so that no opportunity arose for being instructed by the majority of the Court, whether my opinion on this point of law was The case is one of difficulty unquestionably; but erroneous or not. I am still inclined to think that, in such a case as the present, the employer is not responsible. I think it was not alleged that if a workman went down the pit on Sunday, out of curiosity, or from any other cause of his own, and was injured by the unsafe state of the pit, he or his relations could have any claim against his employer. A stranger, in like manner, would have no claim. It was admitted that, if Marshall had come up, not in the usual way provided by his

employer, standing in the cage, but holding on by it, and lost his Brydon or hold, so that he fell to the ground and was killed, no responsibility MARSHALL, &c. would attach to the employer. Nay, I think I may approach even CLELAND IRON nearer to the present case, and say, that if, on occasion of a man hold- & COALCO. and ing on in this manner, a stone fell on his hand and caused him to ROBERT STRWlose his hold, yet the owner would not be liable in damages; as had Damages for he been in the cage it would not have struck him. When the law injury in a coal imposes this severe responsibility on the employer of workmen, to the miner was have all his machinery, and the work itself, in as safe and sufficient at the time dostate as possible, I think there must be a corresponding obligation ing the work of the master, so on the other side, that the workmen should incur no farther risk than as to cause liais necessarily incurred by them in respect of their duty to their em-bility. ployer, to execute the work for which they are engaged. If Marshall had no proper cause for leaving his work at the time he did—if he had continued employed for his master he would not have been coming up at that early hour; and I cannot see that his employer is liable for the accident, which occurred by his improperly leaving work at that time. I felt a good deal of difficulty in coming to this conclusion, when I recollected the cases where the Court held that a trespasser even was entitled to reparation for injuries by an unfenced coal pit, although he was to blame in going near it; and it might be, though multo majus, that if the employer brought a workman to the spot, even if he acted in some respects incorrectly, so as not to be engaged in the employer's service, this would still keep the master responsible for the safety of the workman through insecure machinery. But the case of the trespasser may be resolved, on the same principle which prevents a spring-gun being placed in a pre-The object to be gained is not for one moment to be placed in competition with the risk to human life, and therefore to that extent the proprietor's right to protect his property from trespass and invasion is abridged, in favour of the public at large, more especially when he had it in his power to exclude the trespasses of the public by properly fencing his property. For, unquestionably, it is the duty of a proprietor to fence his property, and exclude the public from using it; and if he does not, then he must take care not to leave a coal pit unfenced in the way, so as to be dangerous, as in the near vicinity of a footpath often taken by the people, although they may have no positive right to use it. And it is observable, that in all the cases this was the character of the danger to which the public was exposed; for in Cadell's case the pit was within four feet of the footpath; in Mack's, in 1832, it was within three feet; and in Sir P. Durham's, in 1842, it was still nearer, for the footpath led to the very brink of the pit, in which the unfortunate girl met with But it has not been decided, that if the trespass is to a greater extent, the same result will follow. Further, these depend on quite a different principle from the obligation of the employer to his workman, and their reciprocal duty to him, further, is, and must be, an individual and corresponding obligation on them, not to enlarge This responsibility beyond the limits required for doing the work for

MARSHALL, &c. is not responsible.

CLELAND IRON Damages for pit,-whether the miner was at the time so as to cause liability.

Brypon or which he employs them. I am for finding, in law, that the defender

LORD COCKBURN.—It is a question of law now before us, and the

and COAL Co. exact circumstances and position of the question must be kept in It arises on the direction of the presiding judge.—the substance of which is, that the men, instead of continuing in the mine injury in a coal till the evening, left their work in a body for a purpose of their own, this purpose being to make a complaint to the employer more effec-The question is, whether these facts liberated the employer doing the work from the duty of having the pit in a condition consistent with the men's safety. I am clearly of opinion that it did not; and this for two reasons:—1st, The men had gone down the pit lawfully, so far as appears. Being down they were entitled so far as appears to They were not bound to pass the rest of the day there. come up. They were perfectly entitled to complain to their employer, and even to combine against him.—though this, like all such complaints and combinations, even when just, was against the employer's interest. Their leaving the pit was, so far as we are entitled to hold, in the prosecution of a lawful object, and accordingly the reverse is not given to the jury as one of the facts on which, in order to raise the legal question, they had to make up their minds. It is true that this verdict finds that they had 'no proper cause for leaving their work.' What is meant by proper cause is not clear; but its meaning is immaterial, because we cannot act on the verdict until it be first ascertained whether it was preceded by a correct direction. If the direction was wrong, we have no sound verdict. 2d, Let it be assumed that, in ceasing to work, the men were acting illegally, and also in coming up at the time they did, does it follow that their employer was liberated thereby from the obligation for their safety, on which they naturally relied? I cannot think so. The authorities seem to me to render this impossible to be maintained. The cases of persons hurt by negligence, even though they received their injuries while committing offences, are decisive of the principle. It cannot be maintained that the duty of carefulness need only be practised in favour of such of the lieges as are acting with strict legal correctness. and therefore stand least in need of other people's care. would have little to say against spring-guns on this principle. drunkards against open pits, trespassers against ferocious dogs or A master is bound to keep the stair of his house in a wild bulls. condition consistent with the safety of his domestic servants,-one of them is killed when coming down. Is it any answer to a claim of damages that the servant was leaving the house, not merely in disobedience, but with the design of breaking his contract by not This was a purpose of his own, and against his masreturning? ter's interest; but still he was not obliged to submit to be tumbled over a broken stair. The deceased James Marshall may have been wrong in not staying in this pit a few hours longer than he did, but I have no idea that this justified his master in killing him. of opinion that judgment should be given for the pursuer.

LORD MURRAY.—Agreed with the majority; and the Court pro-BRYDON or nounced this judgment:—

'Refuse the motion for the pursuers on the question reserved CLELAND INON
' for them, namely, to move on the ground that the direction in the &COAL Co.and
ROBERT STEW' first point was wrong in point of law, that the verdict should on ART.
' that ground be entered up for them, on the second branch of the Damages for
' verdict, namely, as a verdict for damages in their favour; and on injury in a coal
' the motion of the defenders find, in respect of the said deliverance, the miner was
' that the verdict must be entered on the first part of the verdict as at the time doing the work of
one for the defender, and therefore assoilzie the defender from the master, so
as to cause lia-

The pursuers appealed to the House of Lords, maintaining that the bility. substance of the direction was erroneous in point of law, and amounts to this, that if the servant came up from the pit without just cause, the master could not be responsible for injury arising from the defective planking of the mouth of the pit. This is neither the law of Scotland nor England. The law on this subject was said by the House to be the same in both countries. The deceased had a perfect right to be down in the pit, and he had a right to be brought up safe. The evidence does not show that the relation of master and servant had ceased.

The defender contended that the charge given by the Judge involved a sound principle of law, viz., that a master can only be responsible for the safe state of the pit to the servant, while such servant is in his employment. Unless this were so, there would be no end to the liability of masters. Here the servant had repudiated the employment, and the relation of master and servant had ceased, and there is no principle on which the master can be held liable in a case of this kind as against a mere stranger. The case was advised on 13th March 1855. Jur. 27, p. 321.

13th March 1855. Jur. 27, p. 321.

The Lord Chancellor.—The facts of the case as now stated, appear to be these: There was a dispute among the workmen upon They contended that the lining, as I think they several points. call it, was not safe, - unhappily it turns out that they were correct about that. It was said that it was safe. They contended farther that there was not proper provision for supplying air, and there having apparently been some disputes for some days before on this subject, they went down, and it is said by one of the witnesses. that they went down with the determination not to work. however, is a matter of controversy—some say they did—some say they did not. On the contrary one of the witnesses expressly says that he went down and did work. Henry Wylie said he worked. and John Miller said he worked. But however that is immaterial. Some went down and worked, and some did not work. But I will put it in the strongest possible way, that they all went down meaning not to work, that is to say, they all went down (it is said they were working by piece-work), with the determination to make their remonstrances, and to object to work unless some remonstrances were attended to—probably anticipating that they would not be attended to, and, in that sense, not intending to

BRYDON OF WORK. When they went down, they went safely down. They MARSHALL, &c. had their meeting as they called it. First of all, one refuses to ROBERT STEW- WORK. Damages for to cause lia-

bility.

CLELAND IRON come, and goes on to work, and then another, and so on, but & COAL Co. and finally they have a meeting, and they resolve that they will not Their grievances might be well-founded or ill-founded. Resolving not to work, they make the proper signals and they are drawn ramages for solving not to work, they make the proper signals and they are drawn injury in a coal up, and the accident happens in their being drawn up. What is the miner was contended for on the part of the respondent, and to which the diat the time do-rection of the learned judge is pointed is this, that in such circuming the work of stances there is no responsibility by the law of Scotland, in respect the master so as stances there is no responsibility by the law of Scotland, in respect of an injury occasioned by the defect of the machinery. Now, my Lords, in my opinion, not only is there responsibility by the law of Scotland, but clearly there is that responsibility by the law of England, also, which is thought to be less strict on this point than the law of Scotland. A master by the law of England, and by the law of Scotland, is liable for injuries occasioned by his neglect towards those whom he employs. I quite adopt the argument of the Solicitor General, that he is only responsible while the servant is engaged in his employment, but then we must take a great latitude in the construction of what is being engaged in his employ. It would be a monstrous proposition indeed, if having sent a workman down into a mine to work for me, and he then choosing no longer to be employed, and ceasing therefore to be employed, requires me to take him up again, that the taking up should be held to be taking him up without my being liable for the due caution, for which I was liable when I let him down. That is not the meaning of the law. If having taken him up, I afterwards dismiss him, or he remains in my employ, and means to come down to-morrow into the mine again. and in the interval he does something, not in the course of his employment, the master is not by the law of Scotland, or by the law of England responsible for it, but whatever he does in the course of his employment according to the fair interpretation of these words eundo. morundo, et redeundo for all that the master is responsible, and it does not in my opinion make the slightest difference that the workmen had, according to the finding of the jury, no lawful excuse for not going on, nor proper cause for leaving their work; that is to say, there was not, as the jury thought, that danger in respect of the air, or that danger in respect of the lining, which ought to have induced the men to say that they would not work. Even if they had been employed as daily labourers, if they wrongfully choose to say, "we will not work any more," and if without proper cause for so saying, they had said, "we will terminate our contract, now take us up again" it was unquestionably the duty of the master, qua master, to take them up safely, just the same as he brought them down safely. For that purpose the obligation of the master continues in that sense after the termination of the service, after they have in truth continued to work in his employment, and while they were only causing themselves to be removed from it. It appears to me, therefore, that the direction of the learned judge, in the first issue was, as the learned judge seems himself to think it might pro-



bably turn out, not sound, and consequently that the verdict ought to have been given on the second issue. In my opinion it is quite Clear by the law of England and of Scotland, that the injury here Cleland Iron happened to this man from the neglect of his master, while he and Coal Co. was sustaining the character of master towards him, and consequently the verdict ought to be entered up upon the second issue, Damages for and not upon the first.

BRYDON OF MARSHALL V. OMOA AND
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and not upon the first.

LORD BROUGHAM agreed. It is perfectly clear that it makes no whether the difference whatever in this case, whether there was want of proper miner was at cause for coming up from the mine which the jury had found by the the work of the verdict upon the first issue. The master who lets them down is masters as to bound to bring them up, even if they come up for their own busi-cause liability. ness and not for his. He is answerable for the state of his tackle, by which this lamentable accident was occasioned.

Interlocutor reversed, and case remitted, with instructions to enter the verdict upon the second issue, for the pursuer, £150 damages with costs in the Court below.

8th July 1852.—John More Nisbett, Pursuer, against J. M. Nisbett William Dixon & Co., Defenders.—D. 14, p. 973. Jur. Co.

24, p. 605.

The approximate of the lands of Delay against J. M. Nisbett W. W. Dixon & Co. Injury from setting fire to a coal-pit—principal tenant of Delay against J. M. Nisbett W. Dixon & W. Dixon

The pursuer was proprietor of the lands of Dykehead mine liable for In these lands there was coal, which was let to Messrs. der him.

Frew; and ironstone, which was let to the defenders. The ironstone was situated below the coal, there being about 14 fathoms between the respective workings. In the lease of the ironstone, the pursuer reserved the liberty to himself, or those appointed by him, to go down the pits and into the mines, to inspect the operations below ground; and the defenders should not be entitled to interfere with or interrupt any present or after workings of the coal situated in the lands, whether above or under the ironstone, through which the pursuer reserved right to sink pits at pleasure, without any compensation.

The defenders had entered into an agreement with Nimmo and Watson, to work and put out the ironstone from the pit. The contractors were to enter into possession of the pit; draw out the water, for which they were to be paid £6, and after the water was out, 'We shall commence working the stone, and filling up the pit with as many men as 'the workings will contain, which we engage to carry on

J. M. Nisserr' regularly and constantly; and after the first two months. Co. from the date hereof, the output shall not be less than 100 Injury from setting fire to a 'tons calcined stone weekly; or failing our putting out coal-pit—prin-, that quantity, upon the average of two months running, mine liable for at any time, you shall have right to put an end to der him. 'this agreement,' &c.—'The working shall be carried on 'regularly and fairly, and agreeably to the instructions of ' you and your overseer.'--- You shall pay us each fortnight. ' for the stones raised and put out by us, and the men we 'employ, at the rate of 8s. 2d. for each ton of calcined stone. '—'We engage to make all the miners we employ sign ' the "conditions of the contract of the contractors of William 'Dixon & Co. and their workmen," agreeably to the ' printed form subscribed by us as relative hereto.' &c.— 'Should miners' wages come to be advanced, we shall be 'at liberty to quit and give up this agreement at any time thereafter, upon giving one month's notice in writing on 'any pay-day after said occurrence shall have taken place. 'Should we find, after the pit has been fairly started, that ' the same does not pay us, we shall, after the first month's work, be entitled to give up the same, after giving a ' month's notice that the agreement is to terminate.'

> A fire took place in the Dykehead coal, tenanted bythe Messrs. Frew, and it appeared to have been caused by the operations of calcining the ironstone. A large heap of ironstone had been placed on a portion of the surface, called a 'hearth:' some fissures had taken place underneath this heap, in consequence of its weight pressing upon ground which had been excavated by the coal workings. Watson lighted the heap, for the purpose of calcining the ironstone. and portions of the ignited mass fell through the fissures, and set the coal on fire. The fire was only got under some months afterwards, at a considerable expense, and this action was against Dixon and Co. for £1828, 4s. 8d., the expense of extinguishing the fire.

> The issue put for trial was, 'Whether, in the course of O ' the year 1840 and 1841, a fire took place in one of the 'coal-pits within the said lands of Dykehead aforesaid, in 'consequence of the fault or negligence of the defenders 'William Dixon & Co., or of some person or persons, for

' whom the said defenders were and are responsible, &c., J. M. NISBETT

'and whether the amount sued for was expended in extin—Co.
'guishing the fire,' &c. The judge directed the jury to say setting fire to a whether, in their opinion, the fire took place in consequence coal-pit—principal tenant of of the fault or negligence of Watson, and also whether the mine liable for sum claimed, or any and what part of it, was expended inder him. measures reasonable and proper, in the circumstances, for extinguishing the said fire,—reserving to the Court, in the event of these questions being answered in the affirmative. to determine whether, in the circumstances disclosed in the evidence, the defenders were liable for the fault or negligence of Watson; and to enter up the verdict for the pursuers or defenders, according as that question may be determined in favour of the pursuers or defenders.

The jury found that John Watson was guilty of fault and negligence in setting fire to the bin under the then existing circumstances, but under the reservation mentioned in the charge of the judge.

Both parties moved the Court to enter the verdict for them respectively.

LORD PRESIDENT.—(After explaining that the verdict of the jury must be held as proving that the setting fire to the bin carried the fire to the colliery) said :- The next question was, Whether the defenders are responsible for the fault or negligence of Watson. There has been much discussion on that subject in regard to a department of the law, as to which there has been much vacillation and change of opinion. It was necessary that this should be. There are new employments springing up day by day, which consequently give rise to new questions; and it may be, that these employments, in the course of formation, may be in that medium state, that it is difficult to define the character in which the parties are acting.

We must look at the circumstances as they occurred. the question is, Whether, in the circumstances which occurred, the defenders are responsible for the act of Watson.

I must notice the relation which subsisted between the defenders and the pursuer, the nature of the operations, and of the subject that was injured.

The defenders were tenants of the pursuer, under a lease. It was a lease of an heritable subject. They entered into a contract with the pursuer, by which they bound themselves to take out the ironstone, to carry it away, and to calcine it on the ground. We have not any statement as to the title of possession of the land on which the ironstone was to be calcined. But it does appear that the calcining of the iron was, in the understanding of the parties, a part of

J. M. NISBETT the operations to be carried on. From the terms of the tack, dated v. W. Dixon & 28th January and 4th February 1835, it appears that it was a matter Injury from setting fire to be had in view, in estimating the lordship to be paid. The iron-coal-pit—prin-stone was not the mineral which was nearest to the surface; the coal cipal tenant of was, and it was a valuable subject let to another tenant. It may be mine liable for that, as between the tenants of the coal, and the tenants or rather contractor un- the calciners of the ironstone, there was a mutual duty—on the part of the coal people, not to come too near the surface; and on the part of the calciners, not recklessly or carelessly to expose the subject under them to risk; as between the landlord and the defenders there was an implied obligation on the part of the defenders, that in exer-

cising the privilege of calcining the ironstone, they were not negligently to expose the other subject, viz., the coal, to risk.

Now, the injury complained of here, and which gave rise to the expensive operations which have occasioned this question, was the setting fire to the coal through the carelessness of Watson in carrying on the operation of calcining. It is an established fact, that the coal was injured through the carelessness of those who carried on that operation. The landlord has suffered damage through the negligent manner in which the objects of the lease which was granted to Dixon were carried out. Damage was done to the real property of the landlord, in regard to which the defenders were under an implied obligation of carefulness. This is in some respects different from an injury occasioned to a bystander. This is injury arising from the negligent manner in which this particular operation is executed.

The defence against the claim is this, that Dixon and Co. did not themselves calcine the iron, but contracted with another party to do so: that Watson and Nimmo were the contractors, and that it is now fixed law, that a party is not responsible for the operations of another party employed by him, who is known as a contractor. And it is put to us, that these parties were contractors and not servants, Watson being the party on whom the negligence is fixed.

The agreement between Dixon and Co. on the one hand, and Nimmo and Watson on the other, is a writing of a very peculiar No doubt, the word "contractor" wont settle the question of In Rankin's case the word "contractor" is used throughout in connection with the direction given, that the position of a contractor was truly that of the party employed. We must look at

the actual relation subsisting between the parties.

Now, it is true that Nimmo and Watson agreed to put out the ironstone, to employ such persons as they chose, and that they did employ thirty persons. They were bound to go on with these operations, and the agreement was to be put an end to in a certain event I do not observe that Dixon & Co. had any right to put an end tothe agreement. If they meant to stop the working, I presume they could do so, and that the parties could not go on, and take out al the ironstone in that tenement. Therefore the case comes near to be a case of parties who employ contractors; and the question is whether this agreement was one whereby Dixon and Co. devolve away from themselves the responsibility of every thing done to the J. M. NISBETT prejudice of the landlord by the negligence of these parties.

This is not like a contract to produce one complete thing, such as Injury from a contract to build a house or ship; it is a contract of service,—in setting fire to a substance it is that. No doubt Nimmo and Watson are to furnish cercipal tenant of tain things, viz., sleepers. It is one of these mixed transactions, mine liable for partaking of the nature of a contract, but which is mainly employ-contractor unment. It is not a matter which is brought into the position of a separate and independent calling, from the labour which is bestowed upon it. The transaction which is nearest to it is a contract for the construction of part of a railway. That is a contract for employment of labourers. But that is a contract for beginning and ending of a particular piece of work. It is not like this contract, which is to take out ironstone, and to calcine it. That was truly Dixon's contract with the landlord. It was not to be necessarily expected that they would do this with their own hands, or by paying wages to workmen. But could they, by employing other persons to do it for them, relieve themselves of the liability?

Looking to the cases which have occurred, I do not think it has been held that such persons as Nimmo and Watson are those on which such a responsibility entirely devolves. The difficulty is not in the doctrine, but in its application. The first case referred to—that of Rankin—is very near, indeed, to the present. In Rankin's case, it is true, there is nothing but the ruling of a single judge, and there was not before the jury the particular evidence we have to deal with here. But there was evidence of a transaction between the parties similar to that which here occurs. I do not think that the circumstance of the agreement having been reduced to writing will transfer the liability from one party to the other (Read's report of Rankin's case, March 19, 1847).

I do not think that the views of the Court, in the case of Russell, M'Nee, and Company, affect this question. In that case there was a person exercising a separate and independent calling. It was one of those ordinary trades which are continually resorted to. They were persons following out a well-known occupation. It was the act of one of those sub-contractors, not in reference to any use which they had obtained of property belonging to the primary contractors, but in reference to some operation which they had to perform—an injury which was done to a passer-by. That case has no bearing on the position of the parties here. It was not damage done to a neighbour's house, but damage in reference to something which he had to do. Russell, M'Nee, and Co., had nothing to do with the operation conducted by the sub-contractor; but here the ironstone belonged to the other party. They had between them but one trade—that of calciners.

We have had cases of injury to neighbouring property, as in the case of Callender v. Eddington, (4 Murray's Report, p. 108). A party executing repairs under the employment of the defender, brought down or cracked the house of a neighbour. It was not then pleaded that Eddington was not responsible, and there can be

J. M. Nisserr no doubt that he was. It was the opinion of men of skill who were v. W. Dixon & examined, that the operations might have been carried on in such a Injury from manner as to occasion no danger or damage; but as this had not setting fire to a been done, the defender was held liable.

coal-pit—Principal tenant of The case of *Douglas* v. *Monteith*, (4 Mur. Rep., p. 130,) occurred mine liable for in Glasgow. By certain repairs which were executed, the ground contractor un-was made to subside so as to injure the neighbouring house. The

owner got damages.

These are cases of injury to a neighbour's property by the abuse of one's own. But these cases are different from the case which occurs here. The sub-arrangement or sub-agreement here entered into, is not such as to give the sub-contractor such a position that the party can relieve himself of the responsibility otherwise attaching to him in reference to his landlord. The case of Rapson v. Cubitt is similar to those I have described.

I therefore think, on the whole matter, that Dixon & Co. are liable for Watson.

LORD CUNINGHAME.—It was not contended, in argument, that if the defenders had wrought the ironstone contained in their lease by day-labourers, under the sole superintendence of their own overseer, and if the bin had been fired by their workmen, the defenders would not have been liable for any serious damage committed by their fault or negligence; but it was strongly pressed on us that the defenders are not within this rule, that they wrought the ironstone not by labourers paid by the day, but by Watson as a contractor, who is solely liable for his own negligence and wrong.

It appears to me that this plea rests on palpable fallacy, inconsistent with the sound principles of law, and with any right precedent applicable to the case. The landlord contracted with the Messrs. Dixon alone; they were, ex contractu, liable to him for every damage improperly sustained in working the ironstone; and as the tacksmen could not assign their lease, they could not transfer the obligation to repair damage wrongfully sustained to another, whom the landlord neither knew nor accepted, and was not asked

to accept as an obligant.

It would be a serious doctrine to promulgate, that a trading manufacturing company is not liable for injury committed by negligence and unskilfulness, in works going on for their benefit, because they did part of their work by contracts with humble and often irresponsible parties. No such plea has ever been recognized, but the reverse. It is sufficient to answer, that parties in the situation of the defenders are bound to have overseers of vigilance and skill to superintend and check the contractor. There was a specific right given to the defender's overseer to superintend the contractor here; and if he failed in his duty, or was too ignorant to control what was necessary, the defenders were surely liable for his gross mistake and fault.

It has been already observed, that the plea of the defenders to shift their responsibility for loss and damage sustained by the negligiligence or unskilfulness of a sub-contractor, would be subversive of

the rights of parties as constituted by leases, and other analogous J. M. NISBETT contracts of great importance and common occurrence in the business v. W. Dixon & of the world: and I have no idea that there is any understanding Injury from in the country, or among lawyers, to limit the responsibility of setting fire to a parties primarily bound to repair damage in the manner here con-coal-pit—printended for. The law, as immemorially understood and enforced, mine liable for renders all employers liable for the negligence of subordinates, in contractor unwhatever way they are hired and paid, when not constantly and der him. strictly superintended and controlled by the chief employers or their Hence, if a man employ a builder of repute to erect a house for him, that party could not, by letting out the mason-work to a sub-contractor, transfer his responsibility for a faulty or insufficient wall from himself to the sub-contractor, previously unknown to the principal employer. Nor could a stage-coach company, by giving sub-contracts to separate dealers or innkeepers for horsing each stage, (a common practice,) escape from liability of serious damage sustained by an unruly team put on that section of the road thus sub-let. A defence on such grounds appears to be altogether **out** of the question:

But in the present case, the obligation of the principal tenants is broader and more direct than in most cases of injury complained of by third parties and strangers, from common obstructions and casualties occurring in places of public resort. In cases falling within the category of the present, there is a direct contract between an owner and tenant, which cannot be discharged or transferred to any sub-contractor or assignee without the consent of the other principal contracting party.

LORD IVORY.—The second question is, whether, on the understanding that the verdict is right, and that there is to be no new trial, the defenders are answerable for Watson. I shall only add

two general propositions to what has already been said.

The cases which have occurred hitherto have all been cases with third parties, not complicated by any contract with the party suffering the injury. The injury has always been to some third party wholly unconnected with the matter. They were cases of employment of tradesmen within their proper calling—such as a mason, a plasterer, or gas-fitter-employed in things which the individuals employing them are not expected to do for themselves. These are things in their nature separate and distinct. But here the case is different. The injury is suffered by something done in the course of the defenders' exercise of their own rights. It was a matter strictly within the defenders' calling. They called in a subordinate party to perform a subordinate operation within their own trade. The party so called in belonged to the defenders' trade, and was subject to the defenders' instructions. The work was to be done on their own premises, and all in execution of their own trade and That view comes out with greater effect from the position in which the parties stand in reference to the contract of lease. contract refers to a certain field of ironstone. They bind themselves to perform certain duties which are entirely their own. They cannot

J. M. Niskert delegate or transfer these duties. They may, no doubt, employ v. W. Dixon & subordinates, but they cannot transfer their responsibilities to them. The trade which they undertook to forward was to calcine ironstone. Injury from The trade which they undertook to forward was to calcine ironstone. setting fire to a They did so upon their own responsibilities, which are not transfercoal-pit—prin-able. This is stronger than the case of Rankin. The Court entered the verdict for the pursuer. mine liable for contractor un-

DIXON & Co. Principal tenants of ironstone liable for contractors under them in their mode of working it.

der him.

RANKIN, &c. v. 19th March 1847.—The case of RANKIN and Others, against WILLIAM DIXON and Co., 19th March 1847, (9 D. B. M. 1048,) referred to in the preceding judgment, arose from nearly similar circumstances.

> In the year 1840, or beginning of 1841, a fire broke out in the coal workings of Dykehead, possessed by Frew and Co. It commenced in the workings beneath the surface on which Dixon and Co. were calcining their ironstone. The pursuers of the action were the proprietors of the adjoin-The coals on the lands of Dykeing lands of Whiterigg. head were let to Archibald Frew and Co. by the proprietors, the trustees of George More Nisbet. The ironstone on the lands were let to Dixon and Co. The fire was allowed to burn for some time, as neither of the parties admitted liability; but at last, an agreement was come to for extinguishing the fire, reserving the rights and pleas of parties. pursuers, under the agreement, paid two sums of £1734, and £306, towards extinguishing the fire, and they raised action against Nisbett's Trustees, Dixon and Co. and Frew and Co. for repayment. Nisbett's Trustees pled, that the fire having been caused by no improper act on their part, or on the part of any one for whom they are responsible, they were not liable—and as landlords having let the property for a legal purpose to a tenant, they, as landlords, were not liable for the tenant's act.

> Frew and Co., tenants of the coal, held-That they did no wrong in working the coal as they had done, that the fire was caused by the workings of Dixon and Co., and consequently the latter were liable in the expense of extinguishing it.

Dixon and Co. maintained, that they could not be liable

—the fault being in the landlord, or in the tenant of RANKIN, &c. v. the coal leaving sits and fissures in the ground, while the Principal tencalcining operations were carried on in the fair and bona stone liable for fide exercise of a legitimate right. Considerable discussion contractors under them in ensued on the relevancy of the action against some of the their mode of working it. defenders, which was reserved, and the case sent to the jury. as against Dixon and Co. alone. It appeared in the course of the evidence, that Dixon and Co. had employed contractors under them to calcine the ironstone on a berth under which the coal had been wrought out to the crop—that the coal had been worked on the stoop and room system, and there were various sits in the strata, leaving openings up to the surface from the coal waste, and these openings had Deen filled up by the contractors with blaze, which is a very inflammable material and that this blaze took fire when the process of calcination was going on, that the fire comrounicated to the pillars of coal left in the waste beneath. and soon extended to all the surrounding strata. Sits were also caused by the weight of the material laid on the surface by the contractors; and after these sits occurred, the fire was lighted, and no precaution taken against the fire communicating with the coal. The contractors were engaged by Dixon and Co. under a written agreement at first, and afterwards on a verbal one. They calcined all the ironstone at so much per ton, which was paid to them by Dixon and Co., according to measurement, once a fortnight—they hired the workmen and paid them, and Dixon and Co. had no direct management of the calcining operations.

Dixon and Co. denied that they were liable for the contractors. These parties were not ordinary servants, for whom they, as masters, were liable, but independent contractors, with important powers, liable alone for any tortions act committed by them.

The jury returned a verdict for the pursuers, reserving to Dixon and Co. relief against the other defenders.

LORD PRESIDENT.—I have no difficulty in laying it down to you in point of law, that Dixon and Co. are responsible for the acts of the contractors. They were in no different position from any other labourers hired by the month to work by the piece; and, if so, it is for the jury to say whether or not these contractors were not culpably reckless and negligent in the mode of calcining.

R. v. Hellow. Liability for infection by a diseased horse.

R. v. Hadron. 4th Nov. 1852.—R. against Henson.—20 L. T. 63, (Q. B.)

Defendant was indicted for bringing a mare into a public place, where the lieges were passing. The indictment alleged that defendant well knew that the mare was then 'infected ' with a contagious, infectious, and dangerous disease called 'the glanders,' and that 'he wilfully led the mare into the 'said public place, amidst and among divers liege subjects 'there going, passing, and staying,' to the great danger 'of ' infecting with the said contagious, infectious, and dangerous ' disease called the glanders, the liege subjects of our Lady ' the Queen, who, on the said day and time, were in and 'near the said public way and place, to the damage and 'common nuisance of all the said liege subjects,' &c. fendant was convicted by the jury; and his counsel afterwards moved, in arrest of judgment, that the indictment was bad, because it did not allege that defendant knew, that a glandered mare could communicate its disease to a man, which, in fact, the defendant did not know.

The Court of Queen's Bench held it was not necessary for the indictment to allege that defendant knew that such a disease was communicable from a horse to a man. The verdict was therefore good, and judgment could not be arrested on that ground.

MARSHALL v. YORK, N. & B. RAILWAY (Co. Liability of Railway Co. for luggage of a servant.

MARSHALL v. 15th Nov. 1852.—MARSHALL against YORK, NEWCASTLE, YORK, N. & B. and BERWICK RAILWAY Co.—21 Law J. (C. P.) 34.

Lord Adolphus Vane and his servant (plaintiff), entered the railway at Darlington, the latter putting his portmanteau in the train, and the former paying for tickets for both. The portmanteau was lost on the road, and the servant sued the company for the damage. The company argued, that as the master alone had entered into the contract, none but he could sue them.—Powell v. Layton, 2 N. R. 365. That the servant could only sue for a personal injury, but that the duty to carry a servant's goods did not arise out of their contract as common carriers. Plaintiff cited Gladwell v. Steggall, 5 Bing. N. C. 733.

The Court gave judgment for the plaintiff.

JERVIS, C. J.—It was admitted that if the plaintiff, instead of MARSHALL v. losing his property, had broken his leg, he could have had an action RAILWAY Co. for his personal suffering, and his master might have sued for the Liability of loss of his service. But in what respect could the plaintiff have an Railway Co. action for his personal suffering, not because there was a contract a servent. between him and the company, but by reason of a duty irrespective of the contract. In that view, therefore, if plaintiff could recover for his personal suffering, the same admission would apply to the loss of his property. The duty of the defendants to carry the goods, was the same as the duty to carry the person of the plaintiff.

· 19th Nov. 1852.—Horridge against Willoughby.— 20 L. T. 97, (C. P.)

HORRIDGE v. WILLOUGHBY. Liability of ferryman for

The defendant was lessee of the ferry between Birkenhead safe transit. and Liverpool, and took plaintiff and his mare on board. It was not the ferryman's custom to take charge of live cattle on board, and plaintiff kept charge of the mare, and On landing, the pier being defendant did not interfere. some feet higher than the boat, slips with handles were used for passengers, and also for cattle. The hand-rail being broken and tied with a cord, gave way under the mare, and seriously injured her, so that she required to be killed. The plaintiff sued the ferryman for her value, £31, 10s., in the County Court, alleging that defendant was liable as a carrier. whose negligence caused the loss. The Judge held defendant liable, and this was an appeal to the Court of Common Pleas.

The Court affirmed the decision.

JERVIS, C. J.—At the trial below, the objection now sought to be raised, that defendant was not liable as a carrier, was not taken; the objection there was, that he was not liable because he had not the personal care of the mare. The summons does not seem to imply that the action was brought against defendant merely as a carrier. It may mean that for hire he took the mare, and by his negligence it was killed. If so, it will do. It is the duty of the ferryman to provide everything necessary for the conveyance of passengers and goods from the one side to the other. If he stop six feet from the shore, he might as well stop in the middle of the Mersey-the horses cannot jump from the boat on to the pier, and it is his duty to provide for the means of their being landed.

MAULE, J.—If the plaintiff had himself been guilty of negligence, he might not perhaps have been entitled to recover, as having contributed to the injury; but there is nothing of the kind here.

GRAY v.
BRASSEY.
Master's liability to servant for injury caused by negligence of other servants, or defective machinery.

1st Dec. 1852.—Daniel Gray, Pursuer, against Thomas Brassey, Defender.—D. 15, p. 135; 25 Jur. p. 101.

caused by negligence of other
servants, or de-reparation of injuries sustained by the pursuer while in the
fective madefender's service. The libel set forth—

'That the said Thomas Brassey was, for some time prior to the month of August 1849, and still is, the contractor for the mainten-'ance and keeping in repair the line of the Caledonian Railway, ' including a portion thereof in the neighbourhood of a place called ' Broadlee, near Ecclefechan, in the county of Dumfries, on which ' Joseph Simson was agent, superintendent, or manager of the works ' for and on behalf of the said Thomas Brassey, and Joseph Dickson ' was time-keeper, and also superintendent on the said line, for the ' said Thomas Brassey, for the acts of both which parties the said 'Thomas Brassev is responsible. That it was the duty of the said 'Thomas Brassey, as contractor foresaid, or of the said parties or others acting for his behoof, in prosecuting the operations neces-' sary for the maintenance and keeping in repair of the said line of 'railway, to use all due, proper, and requisite precautions for the ' safety of the workmen employed by him, and, in particular, to pro-' vide proper waggons for the purpose of conveying the earth, ballast, or other materials, along the said line of railway, and to see that the same were kept in suitable working order, and had proper ' breaks, and corresponding blocks to regulate them in their proper 'stoppages, and, in general, to provide or see provided, all other and 'similar precautions necessary for the safety of the workmen em-' ployed by him: That on the 6th day of the month of August 1849, or on one or other of the days of that month, or of July immediately ' preceding, or of September immediately following, the pursuer was working on a train of waggons used for the purpose of conveying ' ballast, on the said line of railway, at or near Broadlee aforesaid, and while so working he received orders from the said Joseph ' Dickson, who had charge of the train, to uncouple five of the waggons, in order that the others might be shunted into a siding to ' be filled with ballast: That the pursuer, in terms of these orders, ' proceeded to uncouple the waggons, and was about to stop them, by 'applying the break of the last waggon but one for that purpose; but on the pursuer stepping on the break, it slipped down with him in ' consequence of there being no block on it, -which it was the duty ' of the said Thomas Brassey, or those acting for him, to have seen ' attached or fixed thereto—and he fell down, when one of the wag-' gons passed over and severely injured his left leg, to the serious injury ' of his person, and danger of his life: That by the said injury he ' has been rendered a cripple for life, and unable to earn his liveli-'hood: That the said injury was occasioned to the pursuer by and 'through the culpable fault, negligence, and inattention of the said Thomas Brassey, or of the said Joseph Simpson, as manager or superintendent foresaid, or the said Joseph Dixon, or of some other Brasser.

'person or persons for whose conduct the said defender is responsible: Master's liabitathet the defender was aware, or was bound to have been aware, of lity to servant the insufficiency of the said waggons, and consequent results as for injury now referred to, and it was within his power to have provided ligence of other against the consequences resulting from any waggons being used servants, or which had no break, or no proper break or block attached to it, or defective machinery. Which was not in good working order: That in these circumstances, and as the same will be more particularly condescended on in the course of the process, if necessary, the defender is bound and liable in reparation to the pursuer, in terms of the conclusions after-written: That the said Thomas Brassey is liable in reparation and damages to the pursuer for the loss and damage so sustained by him.

The defender pled:—1. That no action lay at the instance of a servant against his employer, founded on the alleged fault or negligence of a fellow-servant. 2. The accident could not be held to have occurred from the fault or negligence of the defender, or of any one for whom he was responsible. but from the pursuer's own fault and negligence. fered as to the relevancy of the action, and the nature of the issues; ultimately the Lord Ordinary held the libel relevant. and appointed issues. Against this judgment the defender reclaimed, founding on the English authorities. suer maintained, that as there was a direct allegation of negligence on the part of the defender, or on the part of those for whom he is liable, the question was reduced to the point, whether a master is liable for injury done to a fellow-The cases of Rankin and Sword were quoted to shew that he was so,—and that the English principle was unknown in our law-that principle being that a servant enters into a contract with his master to undertake all the risks incident to the service. No such undertaking was It was distinctly stated adjected to the Scottish contract. that it was not the pursuer's duty to put on the block. defender maintained that the pursuer's argument was contradictory to the leading case of Linwood. Here also there were no allegations that the persons employed by the defender were unfit for their respective situations. pursuer himself was the person to make use of the brake. and it was for him to see that it was in proper order. the general case, if the master has selected a fit and proper

lity to servant servants, or defective machinery.

person to do the work, in the course of which the injury Master's liabi- has arisen, he has discharged his duty, and no claim will lie against him. Each person in taking service knows that he for injury against min. Loon possess in second possess and second possess are second possess and second possess are second possess and second possess and second possess are second possess and second possess and second possess are second possess and second possess and second possess are second poss kin's case the main ground on which the Court proceeded was, that there was an absence of superintendence—by the absence of the person who had certain duties to perform.

> LORD IVORY.—The difficulty I have is as to how we are to dispose of the first plea in law for the defender, the meaning of that plea is. that a master is not liable for the fault of his servant, if there be no culpa on his own part, and the English cases were cited to maintain that plea, not to maintain that a master is in no case liable. we adhere to the interlocutor of the Lord Ordinary as it stands, there will be no case whatever open to the defender before the jury. There is a case decided in America to the same effect as Rankin.—Stevens v. The Little Miami Railroad Co., Feb. term, 1850, Monthly Law

Reporter (Boston), new series, vol. iii., p. 74.

LORD PRESIDENT.—In this case we have had a good deal of discussion, a point having been raised which is comparatively new with us, and various recent decisions in England have been pressed upon us, as leading to the conclusion that the interlocutor of the Lord Ordinary should be altered. I am of opinion that that interlocutor is right. The question we have before us at present, is truly a question of relevancy. We must, therefore, take the allegations of the pursuer as set forth on record. Now, the facts as set forth in his summons are as follows:—First, That it was the duty of Brassey to provide proper waggons, and to see that the same were kept in suitable working order, and had proper breaks and corresponding blocks to regulate them. Secondly, That the defender neglected this, and that he, or some one acting for him, ordered the pursuer to uncouple the waggons, while, through the negligence of Brassey, or of those acting for him, there was no break attached. That in consequence of this negligence the pursuer was injured. Now, if the pursuer does establish that it was the duty of Brassev to use proper precautions for the safety of his workmen, 'and, in particular, to provide proper waggons, and to see that the same were kept in 'suitable working order, and had proper breaks and corresponding ' blocks'—that the pursuer was ordered to go to this train and uncouple some of the waggons by Dixon, who was acting for the defender—that he did so, and, in putting down his foot, found there was no break—that it was in consequence of this he received his injury—and that it was in Brassey's power to have provided against such a deficiency, I think the pursuer makes out a relevant case. At the same time, we are not to disregard the authorities quoted to us. I think all our own authorities support the relevancy of the Summons. I do not go much on the authority of Lord Keith r. Keir, where the question was, whether the master is

liable where the servant is acting contrary to his master's orders. That was an extreme case; but I think there are other authorities

Brassey.

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Waster's liability to servant are put to us as establishing a general rule, that a master is not liable for injury to a servant for injury occasioned by a fellow-servant. I am not caused by neg-sure that that is the rule of the English Law, for I cannot trust my-servants, or self to read these access. It may be accessioned by a minimum trust my-servants, or self to read these cases. It may be occasioned by my inclination to defective mathe contrary, but I cannot think that any broad and absolute rule to chinery. that effect is laid down in them. The most recent case is that of Hutchinson. It was tried by Baron Alderson, who says, (19 Law Journal, N. S. p. 299),—'On this Record the question is, whether the defendants are liable for the injury occasioned to one of their own ' servants by a collision, while he was travelling in one of their car-' riages, in his discharge of duty as their servant, in respect of which 'injury, they would undoubtedly have been liable if the party injured ' had been a stranger travelling as a passenger for hire, we think that The principle upon which a master is in general 'they are not. ' liable for accidents resulting from the negligence or unskilfulness of 'his servant is, that the act of his servant is in truth his own act. If ' the master is himself driving his carriage, and from want of skill, ' causes injury to a passer-by, he is of course responsible for that want ' of skill; if, instead of driving the carriage with his own hands, he 'employs his servant to drive it, that servant is but an instrument 'set in motion by the master; it was the master's will that the ser-'vant should drive, and whatever the servant does, in order to give 'effect to his master's will, may be treated by others as the act of the 'master: so far there is no difficulty. Equally clear is it, that though 'a stranger may treat the act of the servant as the act of his master, ' yet the servant himself, by whose negligence or want of skill the ' accident has occurred, cannot, and therefore he cannot defend himself 'against the claim of a third person. Now, if by his unskilfulness, 'he is himself injured, can he claim damages from his own master, ' upon an allegation, that his own negligence was in point of law the 'negligence of his master?' The grounds of this distinction are so obvious as to need no illustration. The difficulty is as to the principle applicable to the case of several servants employed by the same master, and an injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not in general responsible. 'Put the case of a master employing A. & B., two of his servants, to drive his cattle to market; it is admitted, if by the unskilfulness of A., a stranger is injured, 'the master is responsible, -not so if A., by his unskilfulness hurts 'himself, he cannot treat that as the want of skill of his master. 'Suppose then, that by the unskilfulness of A., B. the other servant ' is injured, while they are jointly engaged in the same service, then 'we think B. has no claim against the master, they have both en-'gaged in a common service, the duties of which impose a certain 'risk upon each of them, and in case of negligence on the part of 'the other, the party injured knows that the negligence is that of 'his fellow-servant, and not of his master. He knew when he was

GRAV .. RPASSEY. Master's liability to servant for injury caused by neg-ligence of other servants, or defective machinery.

'engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but on the part of his ' fellow-servant also, and he must be supposed to have contracted on ' the terms that, as between master and himself, he would run that

'risk.'

I do not know, except that some of the words are used in perhaps too general a sense, that there is much here that we could dissent from. although the principle on which I should hold liability to attach in some of the cases selected for illustration by Baron Alderson, is different from that to which he refers it. Take the case, for instance, of two servants driving cattle. If a stranger is injured in consequence of the negligence of one of them, he holds the master liable. I could not dissent from that ruling in our own law. Suppose again. one of the servants had injured himself. I should not hold the master liable, but I should hold this, not because the party injuring was his servant, but because every one is liable for his own conduct. principle of our law is culpa tenet suos auctores. Then, if one of the servants injures another, is the master not liable? Baron Alderson holds not, but he does not shew very clearly on what principle he rests this opinion, and I am not prepared to say, that by the law of Scotland, when two persons are both engaged in the same business, in some one operation which requires the combined exertion of both to carry it on, the master would be liable; but that would not be because they are both servants of the same master, it would rather be because they are both engaged in the same service. I reserve my opinion on that point. The non-liability certainly would not arise from their being in the service of the same master, one to be regarded as the right, the other as his left hand, and because a man cannot be liable for injury done to himself, and when the case is put of my coachman driving along the road, who injures a stranger, say the boy coming to my house with game from the poulterer, or vegetables from the gardiner, I hold that by the law of Scotland. the coachman's master is liable in that case, but if it was his own gardiner's boy, or his own game-keeper bringing game, I am not prepared to say the master is not liable, because these two are not colabourers:—it is a different work they are engaged in,—it is a different calling and occupation. They are servants of the same master, but engaged in a different operation. In the case of Rankin another principle was involved, as indeed, different principles must continually arise, in consequence of the various involvements which are now every day taking place in the relation of master and servant. There it was the duty of the master to provide a certain superintendence of the work, and as that was not provided, he was found liable for the The injury was occasioned directly no injury thence occurring. doubt by some of the co-operatives of the man injured being away from the pit mouth, but their absence arose from the want of superintendence. Here the pursuer libels, that it was the duty of Brassey to provide certain machinery, that the pursuer was a servant of Brassey, who was not in that department at all; that it was no part of the pursuer's duty; but that on the contrary it was the duty of

the defender, or of others acting for him, with a view to the safety of the pursuer, and of those engaged in the same operations, to see Brassey. that the proper machinery was provided, that he was entitled to rely lity to servant. on this being done, and that by reason of its not being done, in con-for injury sequence of Brassey's failure of duty in this respect, he was injured caused by neg-Now that is a failure in a different department from that in which servants, or the pursuer was engaged, and I think we have no decision in which defective mait is laid down, that where that is made out, the master shall not be chinery. Linwood v. Hathorn is a very instructive case, and there is a great deal in the observation of Lord Glenlee, that if the master is to be liable in every case, the work of the country could not go on. But in that case it appears to me, the master was held free of liability on a ground altogether different from that which is pleaded here. That was a case where the Court was sitting in judgment on the evidence, and the question arose, if the cutting down of the very tree which caused the injury, had been ordered by the master, or was not contrary to his wishes. If it was not marked, the cutting down would have been contrary to his wishes; but that could not be proved, because the evidence was shut out by the persons who could speak to it being made parties to the action. I cannot agree with one of the Judges, that all the cases of liability in our law arise out of con-I cannot go so far as that. But where persons are employed in different stations, and the duty of the master is to provide for the safety of each department, and injury arises to a person employed in one department in consequence of the master's failure in his duty. that is, where the statement is such as it is here, I think we are quite out of the case of Linwood. Nor is the case of Rankin here That introduces quite a different question,—who is the master there is then the question, - where there are different occupations, separating the parties into different callings. That was also the nature of the question in Richmond v. Russell, Macnee & Co. In the present case, I hold the Summons to be relevant, and am for adhering to the Interlocutor of the Lord Ordinary.

LORD FULLERTON.—I am of the same opinion. The defender's plea in law here is quite general and unqualified, (reads first plea). goes very far, and would exclude almost every case of injury by fellow-servants, on the ground of the peculiar contract between the Now take the case of a large master workman, master and servant. or contractor, undertaking a job. He gives directions to a certain body of his workmen to proceed to some place at a certain distance to do that work. If he puts them into a waggon which turns out quite defective, and the result is that the men are more or less injured, is there any ground for holding that the master would not be liable. I cannot see any principle on which that could be held. just comes to this, that when a party chooses to treat his servants in the same way as passengers, there is no reason why the same remedy should not be competent to them as to passengers. Then, looking to the statement made in this case. I do not think we run any risk in granting an issue. I think there is much in the remark of your Lordship, that where persons employing servants in different kinds of

GRAY v. BRASSEY. Master'sl iability to servant for injury ligence of other servants, or defective machinery.

work, come to employ them in some operation in which their work is all combined, there may often be a difficulty in saying how far the master will be liable for the injury occasioned by one servant to another. But the present case avoids that difficulty, because the caused by neg-statement is, that the proprietors were bound to have waggons with certain breaks. That is an allegation as to machinery, which it ought to have been safe for the pursuer to use. And the summons proceeds to the effect, that the pursuer was called on to go upon a break, when another party, whose duty it was to see that the machinery was safe, had failed to do so. If it were to come out clearly before the jury, that this man, the pursuer, did something so rash as to go on a waggon, the insecurity of which stared him in the face, I do not know what view the jury might take. But taking the case as it stands, I do not think we can refuse an issue.

LORD CUNINGHAME.—I entirely concur in the opinions that have been delivered. While we shall at all times be ready to receive instruction from English practice, the present case belongs to a class. in which we are not entitled, of our own authority, to alter and reverse the ancient grounds of liability between master and servant in Although our Reports for many years shew that masters have been held liable to all third parties, (without excepting fellowservants,) suffering from the negligence and unskilfulness of other servants hired by the employer, followed up by the late case of Rankin v. Dickson, in the Second Division, the books hardly shew the extent of the understanding in Scotland, as it is believed there is no man of common intelligence and experience in our affairs, who entertained a different opinion. Many industrious people may have relied on that security, and, at any rate, when servants in this country have suffered severe injury from the fault of another workman hired by the master, we are not entitled suddenly to abrogate the responsibility of the latter, existing at the date of their employment. law of Scotland on this point has been long established and acted on. while this question is new in England, arising merely under an Act recently passed; and I must, with perfect deference, remark, that the reasons assigned in the English cases for the distinction urged by the defender, do not appear to me to be altogether satisfactory or reasonable.

At first I was moved by the plea of the defender here, that the pursuer's narrative in the summons shewed ex facie that the injury libelled on was attributed to the gross carelessness of the pursuer himself. But I do not think that there is any room for that plea under the present summons as framed, or at least in the present stage of the process. The allegation, as it stands, is clearly relevant, and if not disproved it may infer damages. On the other hand, if it be shewn at the trial, that the injury was not attributable to the defender, but to the carelessness or want of caution of the pursuer himself, no issue is necessary to prove that, as the fact may be established in answer to the pursuer's issue. The relevancy of that plea is settled in England by a series of cases past question—See Cattlin 8. Man, G. & S. 155; Rigby, 5 Wels., 240.

LORD IVORY.—Substantially, I am of the same opinion as your I do not wish to pronounce any judgment with refer-BRASSEY. ence to the law of England, nor in any way to go beyond our own lity to servant At the same time, in our own law, I do not wish to lay down for injury anything like an abstract principle, and I confine myself entirely to caused by negthe circumstances of the present case, without entering into any con-servants, or sideration of what may be settled hereafter in other cases. My dif-defective maficulty here is principally as to the form in which the matter comes chinery. before us. I could have no difficulty in finding that there is relevant matter on record, but I have some difficulty in adhering generally to this interlocutor, which repels the first plea of the defender. The interlocutor does not merely sustain the relevancy of the summons. it goes farther, for it negatives the defender's first plea in law, and that in respect of the decision in the other division. Now, I think both these findings unnecessary. My objection to thus repelling the first plea, seeing it is to be taken in connection with the cautions expressed in your Lordship's opinion, may not be very material; but that plea, as stated, is, as Lord Fullerton has said, broad, absolute and unqualified, and it is because it is unqualified, that I fear lest our repelling it in this general way may be used for a hurtful pur-If by repelling that plea it is meant, that if a master in the Choice of his servants, or machinery, is altogether free from blame, The may still be liable for injury done, I can only say I am not in-I rather agree with the views expressed by clined to hold that. Lord Mackenzie in Sneddon v. Adie, Millar and Rankin, 16th June, That was a case of machinery, and Lord Mackenzie says:-If the master had done every thing he could to ensure sufficiency, I think there would be great difficulty in holding him liable. think there must be some culpa, however small. The principle cannot go very far, and the presumption undoubtedly is that there was blame.' If that is sound as regards machinery—if from some latent fault in machinery which the master has taken every possible pains to secure against, injury happens, the master is not liable, then, as I read our law, the same principle applies in the case of ser-If the master has done everything in his power to have proper servants, skilled in their department, such as that no prudence on his part could possibly have done more to guard against irregularities in their after conduct, then I am not prepared to say he would be Manyanalogies have been referred to in the course of the argument. I think this rather a dangerous mode of argument, for in all these cases there is some special principle to which the liability is refer-One of the cases referred to as analogous was that of a carrier; but in his case his warranty is to deliver the goods safe which he His contract is to deliver them safe, and it is on that ground that he is liable. Nor do I think it safe to go on the analogy of a man employing an agent to do something for him, and being liable for what is done by the agent as if done by himself. arises from the principle involved in that peculiar contract. So also in the case of tenancy. The obligation of the tenant is to return the subjects in good tenantable condition as he got them; and if a fire

BRASSEY. Master's liabifor injury servants, or defective machinery.

takes place through his neglect, the tenant still remains liable. but if a destruction, partial or total, takes place through some damnum lity to servant fatale, then in so far as the tenant is laid under an absolute obligation to restore. I should hold him not liable. But in the case of caused by neg-service, there is nothing inherent in the contract which renders the master liable. It is a contract of locatio operarum, in which, as regards this matter, there is nothing to bind the parties to each other in one way or another. Of course, if the master puts the servants in a particular position, he must protect them—he must so use his own as not to injure others. But then the analogy which naturally arises is that of the case of third parties, with whom the master has no contract whatever. If I am driving, or if my coachman is driving through the streets, and some one is injured, I am liable. that liability does not arise from any peculiarity in the contract of service, but is an equitable reparation, to a person who has suffered injury at my hand, or from one for whom I am responsible. That is the principle on which the cases of Linwood, and the others which have been cited, are to be explained, but that takes us a very little way. Looking to all these cases, I think there are in all of them, including the American one, and the case of Rankin, dicta which carry the doctrine of liability to an extreme length. I am not inclined to go along with the views expressed in Rankin. They seem to go much on the supposed warranty in the contract. I think there is no such rule in the law of Scotland. I think there is no more such a rule in the case of a servant, than in the case of injury from defective machinery. To take another case. A man is not versans in illicito if he keep a watch-dog, and he is not liable for the dog injuring a person, if he has assured himself of its character. he knows that the dog has shewn vice, and neglects to give due notice, he is liable. I am not prepared to hold that the master would be any more liable if the dog, instead of a stranger, were suddenly to injure one of the servants. He is in his way a sort of fellow-servant. So if my coach is upset and my coachman injured. I am not prepared to admit that because these are my horses I am liable for the injury occasioned to the coachman by a sudden miscarriage arising from fright. But then, as between servant and servant, how far is the liability of the master to go? If I am to be liable for my servant without any culpa, why should I not be liable when my servant is acting criminally, or is seized with a sudden frenzy or weakness, in consequence of which he acts contrary to the way in which any other man would have acted. Have I warranted all my servants in that sort of way? Certainly not. A damnum fatale is not a matter for which one is liable, and why not? Just because it is one of those things for which no prudence can provide. If, therefore, I am to lay down any general doctrine, I should say with Lord Mackenzie, that if there is no culpa on the part of the master, he is I hold with Lord Mackenzie, that culpa levis will do. The presumption of course will be against the master; but if it should come out before the jury that the master, in regard to his servants, had done all that man could do—that there was no culpa,

Clirect or indirect, on his part—all I would say just now is, that I am not prepared to hold that he would be liable if one of the servants were Master's liabithe cause of injury to another. Therefore, I am not prepared to nelity to servants grative this defence in the absolute manner in which the Lord Ordin-for injury ary has done it. I think the defence includes that case. At the caused by neg same time I think, that with those cautions which your Lordship servants, or Thas thrown out, and looking to the allegations made here, and to the defective ma-Law of Scotland as decided in similar cases—and we are not in the chinery. same position as in England, for we have many such cases in our books, and therefore are not obliged to go into what the English judges have looked to so much, the matter of general policy, nor in any way to go beyond the present case—perhaps no great danger may result. I should like, as I have said, to see out of the note these words. "in respect of the decision in Rankin," because that ties me down to the extreme views thrown out in that case. I object also to repelling that first plea. Still, I am quite satisfied that your Lordship understands the repelling of that plea, as I would wish to do, and therefore I do not press my objection. My only fear is in regard to the use that may be made of it in future cases.

LORD PRESIDENT.—I confess I am more afraid, if we do not repel it, that it may be said we adopt the law of England.

R. against SAMUEL LOWE, 3 Car. and K. 123.

Panel was an engineer, whose duty it was to manage a duty renders steam-engine at a coal-pit used to draw up miners; and nally. when the skip containing the men arrived on a level with the pit-mouth, his duty was to stop the windlass, so that the men might get out. One day he left the engine in charge of an ignorant boy, who told him he could not manage the engine, but the prisoner only threatened the boy if he did not do what he was ordered. The boy thereafter, in raising a skip, was unable to stop the engine, in consequence of which a miner was killed on the spot. It appeared that though any competent engineer could have rectified the error committed by the boy, the latter could not. In defence it was contended that a mere omission or neglect of duty could not render a man guilty of manslaughter.

LORD CAMPBELL, C. J.—I am clearly of opinion, that a man may, by a neglect of duty, render himself liable to be convicted of manslaughter, or even of murder.

R. v. Samuri Lows. Negligence of

PEACHY v.
ROWLAND.
Owner not liable for contractors committing a nuisance in carrying out a lawful contract.

13th January 1853.—Peachy against Rowland.— 22 L. J. 81, (C. P.)

Defendants were builders who had erected some houses at ance in carry-Walham Green, London, and contracted with one Ansell to construct a drain from these houses to the main sewer under the public road. The earth had been improperly filled in after it was completed, and one night, there being no lamp or signal, plaintiff's cart drove against it, and he He sued the owners of the house for damages. was injured. At the trial it appeared that one of the defendants had been on the spot four days before the accident, and had seen part of the drain covered in, as it was when the accident happened, but that neither of the defendants had any control over, or anything to do with the way in which The judge then held that no acthe earth was filled in. tion lav. and ordered a verdict for defendants. was made for a new trial, on the ground of misdirection. The Court of Common Pleas held that no action lay.

MAULE, J.—The question is, whether, upon the evidence taken altogether, the jury ought to have found for the plaintiff. We are not to look with extreme scrupulosity to see whether there may not have been some tittle of evidence for the jury, for, when considering a motion for a new trial, the Courts have said that, what is practically no evidence, is absolutely no evidence. Now, here there was no public wrong; and the question is, Did the defendants employ Ansell to do the work in the special manner in which he did it? Did they order him to commit a nuisance? I think not.

MITCHELL v. CRASWELLER. Master not liable for negligence of servant when not on master's duty. 27th January 1853.—MITCHELL against CRASWELLER. 20 L. J., 237 C. P.

Defendant's servant had been sent with goods in a cart to the city, and on his return a friend of the driver asked him to drive him (the friend) home in the cart. The driver, in doing so, went out of his way, and also ran down plaintiff's wife, and seriously injured her, for which action was raised. Defendant pled that, as the driver was not at the time on his master's business, the master was not liable; that the servant's duty was, in returning from the city, to

take the horse direct to its stable, and he had not defend-MITCHELL V. ant's permission to go where he did; and therefore the Master not master could not be responsible for his negligence. The liable for negligence of ser-Court of Common Pleas gave judgment for the defendant, vant when not holding it well settled, that a master was not liable for duty.

a negligent servant, while not engaged on his master's husiness

24th March 1853.—Johnston against Shrewsbury and Johnston v. Birmingham Railway Co.—22 L. J. (Ch.) 921, (Ch. Ap.) Shrewsbury and Birming-

1 Johnston v.
Shrewsbury
And BirmingHAM RAILWAY.
As to limited
I liability for

The plaintiffs agreed with defendants, for a period of liability for ten years, to keep up and repair all their rolling stock, and damages work all their trains, and provide workmen. &c. clause provided that, if plaintiffs should not, within fortyeight hours after notice in writing from defendants, signed by the secretary of the Company, had been left at the works, 'obey the instructions given in such notice,' it should be lawful for defendants forthwith, by another notice, to determine the contract, and assume the custody of all sheds and buildings, plant, engines, &c.; then followed the terms on which the defendants might determine the contract, and the sum they were to pay the plaintiffs there-One provision also was this:-- 'Provided also ' that the contractors (plaintiffs) shall not be liable or answer-'able for any loss, damage, or compensation, or other pay-' ment recovered or recoverable from the Railway Company, ' (defendants), in respect of the death, or any damage or 'injury to any passengers or live stock, &c., except when ' caused by the neglect of the contractors or their servants; ' but in such case the liability of the contractors shall not on ' any one occasion exceed the sum of £100, for or in respect ' of all the deaths, losses, damages, and injuries caused by ' and resulting from such accident.'

The Company served a notice on the contractors to put into working order all the engines, carriages, &c.; and a second notice having been given as to other things, the Company hinted that they intended to give the notice to determine the contract. The contractors then applied to

foreground the Court for an injunction to prevent this on the ground Surgery that it was impossible for them to do some of the thines HAM RAH.WAT required in less than three months.

COMPANY. liability for demages.

The Court of Chancery refused the injunction, and though it was not necessary to decide the point, threw out an epinion that the contract was illegal.

K. Better, L. J.—There is a proviso here which appears to me rather extraordinary, (reads the clause as to £100) in case of accidenta); the effect is, that the running and working of the trains, so deeply interesting to a large class of the Queen's subjects is committed to a class of persons who may cause any number of deaths, and any amount of bodily injury to any number of persons, at the cost of £100, and no more. When the directors run and work the trains themselves, they are under a grave responsibility, and there is that kind of guarantee for care and attention; in this case society leases the guarantee—a matter not to be overlooked in the case, when speaking of the agreement as to whether it is contrary to public policy.

TURNER, L. J.—On the legality of this contract I entertain doubts; but it is not on such a doubt that I concur in deciding

the case

M' Neatt. v. WALLACT &CA. Coal pit- Manter not liable if workmen procood in a hazar7th July, 1853.—M'NEILL, Pursuer, against WALLACE & Co., Defenders.—D. 15, p. 818, 25 Jur. p. 492.

This was an action of damages for injury done the dona operation pursuer, by the falling in of the roof of a "room," or excain face of a pursuer, by the mining in a coal pit belonging to the defenders, in which the pursuer was working. It appeared that the defenders undertook the propping up of the main roads through the pit, while it was the duty of the workmen to look to the propping up of the room or excavation off the main roads. wood for the latter purpose was kept at the pit mouth, and the rule and practice was, that the defenders should keep a supply of wood at the pit-mouth, of which the workmen could avail themselves as they required it. The Sheriff Substitute assoilzied, in respect that the accident was occasioned by the pursuer's own neglect, in not propping the The Sheriff (Alison) altered, and found damages, on the ground that, although blame was attributable to both parties. the origin of the accident was in consequence of the neglect

of the defenders or their servants. In an advocation, the M'NEILL v. WALLACE & Co. Lord Ordinary reported the case, when the Court pronounced WALLACE & U.O. the following Interlocutor, assoilzieing the defenders:—'Alter ter not liable if 'the Interlocutor complained of,—Find in point of fact, ceed in a hazardous operation
'that it was the rule and practice of the colliery in which in face of a 'the pursuer was working, that the colliers should duly prop "seen danger." 'and support the roofs of their several rooms, in order to ' prevent injury to themselves, or to the workings in the said ' mine; that such use and practice was fully known to the ' pursuer, and thus it was his duty so to prop and support 'the roof of the room in which he was directed to work. 'after the same had been opened a certain length by another ' collier, in order to prevent danger to himself and to the work-'ings: Find, that he was warned the day before the acci-' dent, that it would be dangerous to proceed with the work-'ings of this room without propping the roof, and that in the knowledge of such danger, he sought for props on that 'day but could not find any: Find that next day, without ' obtaining props, or asking for the same if there were none 'at the pit-head, he proceeded to work farther in the room ' without obtaining props for the roof, to his own manifest 'risk and danger: Find that his duty was not to work 'when it was thus dangerous to do so, but to ask for and ' obtain props for the support of the roof if there were none 'at the pit-head, and that if none were obtained and sup-' plied to him, that he, being ready to fulfil his engagement, ' but entitled and bound not to work with danger to him-'self at the workings, would have been entitled to his day's 'wages: Find, therefore, in point of law that the pursuer, ' on this state of the facts, is not entitled to claim damages 'in respect of the fall of the roof which he thus failed to 'support, and by which he was injured, from the coal-mas-'ters, merely because the supply of wood was not furnished 'to him on the morning of that day. Therefore assoilzie ' the defenders from the conclusions of the libel, and decern, ' but find no expenses due to either of the parties.'

LORD JUSTICE CLERK.—I think that this case involves an important principle, and it is very material that the grounds of our judgment should be correctly stated and generally known.

The Court has on many occasions enforced the principle, that it

W. Went, s. is the paramount duty of coal-masters, and persons engaged in such Coal pit-Man

Wallaczaco undertakings, to provide in every way for the safety of the workmen ter not liable if in their employment against the risks and dangers which such emworkmen pro-ployment involves, and the Court has also held most justly, that cosed in a hazar-such masters must, by their precantions and arrangements, protect does operation their workmen against the consequences of their own rashness and "seen danger." imprudence,—such workmen being proverbially reckless and careless of danger. But on the other hand, we must take care that the law is not pushed to such a length, as to encourage workmen, in their rashness and imprudent disregard of danger, when fully aware of such danger, and when it is their special duty in their employment to take the measures necessary to prevent such danger. Then what is the special case before the Court ! The roofs of the rooms in which the colliers work must be supported, and if not supported as the workings go on, and when the mof is left suddenly without support, then the danger of stuff falling from the roof upon the workmen is immi-This is well known to masters and servants, and the duty of both is to prevent that danger,—each in the way to be mentioned. but each by separate measures on their own part respectively. masters of course, furnish the timber for props,—that is the rule. The props must also be placed at the pit-mouth, ready for the workmen to cut up and use. If not brought to the pit-mouth, it would be impossible to expect that the men should be going about at all hours of night and day in all weather, to look for props and bring them from a distance after they come to the pit-mouth, in their working dress ready to descend. The workmen are entitled to find the props ready for them. It is no part of their service to bring the prope to the pit-mouth, more than to obtain any other of the proper pit supplies. Now, that there is danger in working without the roof being propped is a fact certain. That prope for the purpose must be supplied by the pursuer's master is also clear in this case, and probably in all cases, without special bargain on the subject. Then the workmen are themselves to prop the roof with the wood found for They are to fit and properly place the props; that is their business and duty. If the props are not properly fitted and placed. -if cut by the men of insufficient length, or not duly or adequately placed or secured,—then the fault is solely that of the workman: and if the roof falls, it is the result of his own unskilfulness or want of attention. Thus the measure on which their safety depends, is to be taken by the workmen themselves. The case is not one in which they are using what is found and given to them as sufficient and complete for their protection, in every sense without something on their part, and which without inquiry, they are to go on using perhaps too long; nor are they entitled to rely on the safety of doing so. because they have machinery, ropes, &c., given to them as complete, and the master's duty being to inspect it, and keep it in a safe state and condition. On the contrary, this is a case in which the steps to be taken for their safety are to be taken by themselves, and if they do not take these measures, they know that they are directly placing themselves in danger which they ought not to incur, and which it

Tor their own duty is to prop the roof, and not to work without doing WALLACE CO Coal pit—Ms so. The roadways of the mine, on the other hand, the masters prop ter not liable up, and make sufficient by persons appointed for that purpose, and on workmen pr such being securely done, the workmen are entitled to rely. But the dous operations of their own rooms, the workmen are to prop as they excavate in face of a coal, and they know the danger to be great if they do not so prop. "seen danger to be great if they do not so prop."

His Lordship proceeds to state, that there being a seen danger in working for want of props, and that some of the witnesses having said that they were either obliged to run this risk or want their wages, he adds:—

I wish it to be well and generally understood by the colliers, both For their own sake, and for the sake of the true interests of their employers, that such is not the alternative; and that, if the proper supplies for the safety of working are not furnished by the masters. and ready for the men—they being at the pit ready to work in Fulfilment of their engagement, but not having the supplies which the masters must furnish to enable them to carry on their work with safety—are entitled to their day's wages, although they should not, as they ought not, attempt to work to their own danger. is a matter which it is most important the colliers should understand. Of course the Court do not mean that, if at the exact hour -say four or six in the morning—when the men come to the pitmouth, they find that the wood required for props has not been sent, if asked for previously, still less if not asked for, they are entitled to turn at once to the right-about—walk off—send no message for wood—nor look near the pit that day, and yet be entitled to their wages. No such abuse would be sanctioned. They must wait a reasonable time for the wood. They must distinctly apply to the proper party, if on the spot, to get it, and that if not got, they will leave the pit-head, as they cannot go down to work in rooms which have no proper supports; or if the party is absent, as on this occasion, whose duty it was to have the supply ready, they must send for the supply if they know that there is any belonging to the coalmaster at a convenient distance. If he has none ready at any reasonable distance, so that there is no prospect of any being got for the day's work, their right to return from the pit-head will, of course, very soon arise.

But under such and similar limitations, to prevent pretexts being made to abstain from work, and yet claim wages, and taking the honest case which occurred here, that the further working in the room could not, without props, be carried on without imminent danger to life or limb, and that, on the other hand, no props were furnished by the master for the workmen to enable them to work in safety, then I apprehend it to be clear law, that after requiring props, and sending notice that they must be furnished, the workmen are not only entitled, but bound to abstain from incurring danger, when they find

M'NELL s. that they had not the supplies necessary to save them from danger. WALLACE & and are entitled to their day's wages, and that they are not to blame Coal-pit was for no work being done. They are ready to work; they are not ter not liable if bound to work in the plain risk of danger: the masters are hound workman pro-to protect them against such risk; that is the condition on which dons operation
in face of a It is very important that this should be understood to be the law.

"seen danger." of such a case, (of course I exclude abuse); for then, the colliers will be led steadily and quietly to refuse to work when there is danger. until they have the means of preventing the danger; and the masters and their managers will also be led to attend much more pointedly to the supply and examination of the adequate and suitable materials for ensuring the safety of the men while working. For the interests of both parties, for the safety of life, it is most important that the workmen should know that they have this practical method of ensuring attention to the measures necessary for their safety—although, of course, any attempt to get up a flimsy and inadequate pretext for not working will be very strictly checked. I have said this is a case in which the men themselves were the parties. and the only parties, to take the measures necessary to provide for their own safety—the materials being furnished to them by the masters. Hence this case cannot be quoted as leading to the result, that in the ordinary circumstances which occur, the masters, if they have neglected their duty of providing for the safety of the workmen, have used too long insufficient machinery, or have not had their mines examined against fire-damp, and so forth, are relieved from liability for damages merely because the men have been, as they always are, and are known to be, rash, imprudent, and reckless. On the contrary, that very tendency of ignorant men is only an additional ground why the masters must protect them against the risks they so run, by all the proper precautions which it is their duty and obligation to adopt; and that law I stated in various cases to juries. If the men directly disobey a positive order, either general or given at the time, that is another matter, and they must bear the consequences. But I take the case, say of explosion from fire-damp:-If the mine was not examined as it ought to have been, and according to practice, before the men began to work, the master, if an explosion takes place, and life is lost, will not be free from liability civilly, or he or his manager criminally, merely because the men were imprudent in beginning to work before the examination was made, or in not inquiring whether the mine was so examined—unless, indeed, there is some very pointed order or rule which they choose to break through. This case, then, will in no degree sanction the inference, that the masters are to be free from responsibility merely because some imprudence and rashness has been exhibited on the part of the workmen-quite the reverse. But here the pursuer ran into a 'seen danger,' when his duty even to his employer was not to work. On the other hand, he would not, in the circumstances proved, have lost his right to wages. Judgment must therefore go for the advocators, but without expenses.

LORD MURRAY.—I consider it absolutely necessary to lay down M'NEILL v. clearly both the employer's and the collier's duty. It is clear that WALLACE & the master is liable for all the machinery, that it be sufficient, as Coal-pit—Maswell as for the sufficiency of the pits themselves. It is unnecessary ter not liable if to go into the question, as to any failure of duty in the master in not workman prohaving wood at the pit-mouth; but I assume there was a failure, dous operation and on that assumption, which the evidence I think justifies, I still in face of a think the master's failure gave the workman no right to proceed at the hazard either of himself or of the works. The master's failure was of a secondary nature altogether, and the pursuer transgressed in face of warning. I hold that it is a clear duty, on the part of colliers, not to work where the pit is unsafe owing to failure in duty on the part of the tenant, and they will be entitled to their wages though they do not work.

7th November 1853.—Ellis against Sheffield Gas Ellis v. Shef-Consumer's Co.—22 L. T. 84, (Q. B.)

FIELD GAS CONSUMER'S Co Company held liable for inju-

Defendants employed a contractor to lay their gas-pipes ries sustained through the in the streets of Sheffield, and in consequence of stones and operations of a earth left on the street, and no sufficient light by night, contractor, in the plaintiff fell and was injured. He sued the Gas Com-work was in furtherance of Defendants contended that they were an illegal act. pany for damages. not liable, and that if any one was, it was the contractor. Even if the work done was illegal, that they were not liable by civil action, whether they were so criminally or not.

The Queen's Bench held the Gas Company liable.

LORD CAMPBELL, C. J.—The proposition is quite untenable, that where there is a contractor employed to do the work, the person who employs the contractor can in no case be liable for damage arising from the performance of the work. It seems to me that if the contractor does what he is ordered to do, the act of the employed is the act of the employer. I approve of the decision in Knight v. Fox. 5 Exch. 721; Peachy v. Rowland; and Overton v. Freeman: because, in these cases nothing was ordered to be done but what the employer had a right to order to be done; and there being a contract to do what was lawful, the employer was properly held not to be liable for what was done negligently in relation to the contract. The relation of master and servant does not exist in such cases. But, in the present case, the employer had employed the contractor to do an illegal act, which was the cause of the damage that arose, and the very ground of the present action. The defendants had no right to lav open the streets of Sheffield to put down their pipes, and the accident arose from the stones being taken up according to their orders. This is a case where a person is employed to do what is unlawful,

ries sustained through the operations of a contractor, in respect that the work was in furtherance of an illegal act.

ELLE S. Suzz-and of loss arising from doing that unlawful act. There is therefore FIELD GAS both damnum and injuria; and the defendants having employed the CONSCHER'S CO COMPANY held contractor to do the act, are liable for the loss. liable for inju-

> 11th Nov. 1853.—WALLIS against MANCHESTER and LINCOLNSHIRE RAILWAY CO.—C. P.) 22 L. T., 286.

WALLES E. RAILWAY CO.

Two horses belonging to plaintiff were grazing in his MANCHEMIER, a park, through which a highway passed, having gates at each LINCOLNSHIER end of the park. By some negligence on the part of a Damage by im-traveller one of the gates was left open, and the horses perfect fencing straved through it, and went into the station yard of the railway, close at hand. One of the railway servants turned them out again into the highway. They had afterwards. however, again entered the station vard, and were acciden-They then went through an opening in tally locked in. the fence separating the station yard from the line of railway, and got upon the line, where they were killed by a goods train. The plaintiff brought an action for their value against the Railway Company, alleging that the loss was owing to the Company's negligence in leaving their station vard gate open, and also in leaving an opening in the fence separating the vard from the railway. The facts proved were, that it was owing to no fault of the Company that the borses got on the line of railway.

The Railway Clauses Consolidation Act, 8 and 9 Vict. c. 20, sect. 68, provides, 'that the Company shall make, and 'at all times thereafter maintain, the following works, for ' the accommodation of the owners and occupiers of lands 'adjoining thereto; that is to say, amongst other things, ' sufficient posts and rails, hedges, ditches, mounds, or other ' fences, for separating the land taken for the use of the ' railway from the adjoining lands not taken, and protecting 'such lands from trespass, or the cattle of the owners or ' occupiers thereof from straying there by reason of the rail-' way; together with the necessary gates, made to open to-' wards the adjoining lands, and not towards the railway, 'and all necessary stiles.' There is an identical section in the Scotch Act, 8 and 9 Vict, c. 33, sect. 60.

The Court of Common Pleas held the Company not liable. WALLIS & MANCHESTE

JERVIS, C. J.—Certainly this section makes a very inadequate SHEFFIELD, Provision for the protection of the public, where a railway runs along-RAILWAY C side a public highway; but, nevertheless, it is clear that this clause Damage by i was intended to apply to such a case as this; for if not, there is no perfect fenci section which casts the obligation to fence a railway in such cases. The highway, therefore, is to be considered to be adjoining land not taken, and the same construction must be put upon the same words. whether that adjoining land be a public highway or a private close What, then, is the nature of the obligation cast upon the railway by this section? They are bound to fence, so as to keep the cattle of the owners and occupiers of adjoining lands not taken from straying on to the railway. Ricketts v. East and West India Docks and B. R. Co., 21 L. J. (C. P.) 201, has already determined that the obligation of the Railway Company by this section is the same as it would have been at common law, if they had been bound by prescription to repair the fence; in other words, they are only bound to keep up the fences against the cattle of the owners and occupiers of the adjoining lands. Were, then, the cattle of the plaintiff, at the time they were killed, the cattle of the owners and occupiers of the adjoining lands? We think they were not; and the case of Dovaston v. Payne, 2 H. Bl. 527, appears to us to decide that question. Whilst the cattle of the plaintiffs were straying on the road, the plaintiffs were not occupying the road, and therefore there was no Obligation upon the Company to maintain a fence against them. If. then, there was no obligation to maintain a fence against the plaintiff's cattle, the Company were guilty of no wrong in omitting to do so. There is no complaint that the railway was conducted improperly; the only complaint is, that the fence was not sufficient. The Legislature, with a full knowledge of the danger of railways, has cast on them a limited obligation only; and we cannot enlarge it merely because the public safety may be endangered. This distinguishes the present case from Fawcett v. York and North Midland Railway Co., 20 L. J. (Q. B.) 222; Bird v. Holbrook, 5 Bing. 626; Barnes Ward, 19 L. J. (C. P.) 195.

24th Nov. 1853.—Scrip against Eastern Counties RAILWAY Co.—23 L. J. (Exch.) 23.

SCRIP v. EA TERN COUNT RAILWAY C Non-liability

Plaintiff was a railway guard on the defendants' line injuries to His duties were to attach goods carriages to the engine, and servant. despatch them to a particular station. He was occasionally assisted by a porter. On 5th July 1852, it was necessary to shift the carriages from one line to another, and within a limited time, in order to prevent a collision with a down

Company for injuries to a garvent

SCRIP v. Eas- passenger train which would shortly become due. While he TERN COUNTIES RAILWAY Co. was in performance of this work, and for want, as he stated, of Non-liability of an additional person to assist him, the engine started, and he was thrown on the rails, and his arm was crushed, and had to He had been three months in the company's be amoutated. He sued the Company for damages. service as guard. alleging that it was the duty of defendants to take all due precautions to prevent unnecessary danger; and that, in consequence of their neglecting to assign some one to assist him in the present instance, he had met with the accident.

The Company contended that, as he had voluntarily undertaken to attach the trucks to the engine without any additional assistance, the Company could not be liable. On the other hand, plaintiff contended it was the duty of the Company to keep a sufficient number of hands, and tried to distinguish the case from Priestly v. Fowler, Wigmore v. Jay, and Hutchinson v. York, Newcastle Railway Co. Court of Exchequer held no liability.

PARKE, B.—If his duties were more than he could perform, he ought not to have accepted the service. The defendants are not bound to keep 20 servants. They are to be the judges of the num-They are, indeed, bound to see that their servants are persons of proper care and skill. The plaintiff here goes into the service. and willingly incurs the danger.

ALDERSON, B.—The jury are not to be the judges of the sufficiency of the number of servants a man keeps. The plaintiff stayed in this situation three months, without having an under guard to assist him, and without making any objection.

TERSON v. WALLACE &Co. Liability for sufficiency of roof of coalmine-with-drawing case from jury.

Muir of Pa- 17th December 1853.—Mrs Mary Muir of Paterson and Others, Pursuers, against Wallace & Co., Defenders.— D. 16, p. 243. 26 Jur., p. 123.

> Robert Paterson, while working in a coal-pit at Easterhouse, the property, and in the occupancy of the defenders, was killed on 1st December 1851, by the falling of a stone from the roof of the pit. The question of liability was raised in an action of damages at the instance of the widow and children. The issue put to trial was, "Whether the deceased Robert Paterson, while engaged in the service of

' the defenders, as a miner in the said pit, sustained injuries MUIR or PA-' to the person, which shortly afterwards caused his death; Wallace & Co. 'and whether the said injuries were occasioned by reason sufficiency of of the unsafe and insufficient condition of the road or main-roof of coal-mine—with-road of the said pit, in which the said deceased was engaged drawing case 'as aforesaid, and of the roof, or part of the roof, of the said ' road or mainroad, and by the fault, negligence, or unskilful-'ness of the defenders, or of any person or persons for whom ' they are responsible, to the loss, injury, and damage of the ' pursuers.'

At the trial, and after the proof had been led, the Lord Justice-Clerk told the Jury that, on the evidence adduced, the pursuers could not recover damages. The counsel for the pursuers took exception to this charge, and farther requested the Judge to state to the Jury, that if the defenders' manager failed in his duty in timeously directing the stone in question to be removed, it would afford no defence that Paterson continued to work after the orders for the removal of the stone had been ultimately given; and that, if Paterson so continued to work, in consequence of the directions of the roadsman, the defenders are responsible for such directions. This direction the Judge declined to give. The Jury found for the defenders. At advising the bill of exceptions-

THE LORD JUSTICE-CLERK.—In this case I understand that the exception to the direction I gave is rested upon both grounds, viz. :--1. That the view of the facts on which the direction was given was erroneous; and, 2. The direction is in point of law erroneous, even if the view taken of the facts is correct. At the trial, I thought the right to recover excluded by two simple facts.

The deceased was not working under the stone, and if he had continued even working in taking out coal, and it had fallen, it would have fallen in a lower level by several yards from him. But when the first of the roadsmen arrived, he told the deceased that they were come to remove the stone, which the deceased said he was glad at. But then, unhappily, he did not stop till the stone was removed, nor did he continue working higher up, and free from the stone as before, in taking out coal. He had taken out nearly a hutchful, and the coal taken out was then pressed down the level and nearer to the stone. And to prevent the coal being dirtied by any rubbish, and to save the trouble of afterwards separating such rubbish from the coal, he and the roadsman for his benefit combined in this unfortunate arrangement-viz., that a hutch should be brought up to be

TERSON #. WALLACE & Co. Liability for sufficiency of roof of coalmine-withdrawing case from jury.

Muir or Pa- filled by the coal before they took down the stone. This was done for the benefit, small as it might be, of the deceased, and was a plan among the two sets of workmen, the deceased and his son and the two roadsmen. The result of this was, that, as the coals when taken had been thrown down the level nearer to the stone, and the hutch brought up the mainroad towards the coals, the hutch was thus brought under the stone, and the man, in going down to fill the hutch, was thus brought into danger, which in his proper place he had not before run. Now, the two facts on which I proceeded, as raising in law a sufficient defence against the right to recover, were: 1st. That the foreman in charge had given orders to take down the stone, and that the men arrived at the spot immediately with their tools to take it down before the accident. 2d. That if the deceased had stopped working until the stone was removed, knowing that the stone ought to be taken down, and having asked that it should be removed, he could not have suffered. But he, by an arrangement with the roadsman, began a new proceeding for his own benefit; and, instead of letting the operation of taking down the stone proceed, actually brought himself thereby directly under the stone, and so into the very danger which he had desired he should be protected against. and this for his own apparent benefit, and thereby stopping the operation directed by the foreman of taking down the stone.

We have had occasion to lay down the doctrine, that mere rashness on the part of a workman in trusting too long to the existing state of things will not exclude a claim for reparation if the employer has neglected his duty in not timeously providing for the safety of the men, or if his general instructions are neglected, by neglect on the part of other servants and the want of inspectors over them. But then, the facts here, if my view of them is correct, raise a very different question, and bring in the fault of the man injured as the true cause of the injury. Hence, I think, on the state of the facts which I have stated, those in his right cannot recover. Indeed, if such is the state of the facts, the only ground of objection urged against the direction was, that, nevertheless the masters were responsible for the roadsmen going into the delay for the purpose of the deceased filling his hutch. But that is plainly not a sound application of the doctrine we have laid down, as to the responsibility of the employers for the fault of fellow-workmen. Here the deceased was not entitled to bring himself below the stone at all, after desiring it to be taken down, and after the men were there to take it down, much less to do so for his own supposed benefit or ease, and if they, as fellow-workmen, stopped to let him go on, he was the party to blame, so far as relates to the place and position into which he chose to bring himself from that motive; and, if he had not attempted to fill his hutch. there would have been no accident. Both as to the exception to the direction, and as to the proposition I was asked to adopt, the short answer is, the man was killed by his own rashness in bringing himself directly into the known danger, at the very moment when the men were about to remove the cause of danger.

LORD COCKBURN.—My difficulty relates to the exception to the

direction that, in the evidence, the pursuers could not recover MUIR or I damages. I concur in that result, but not without considerable WALLACE & difficulty. That is a result which depended entirely on the view Liability fo which the Jury might take on the evidence. Now here the case was sufficiency withdrawn from the Jury. There are cases in which it is quite plain mine—with that the facts proved cannot entitle a pursuer to a verdict, and in drawing ca which, accordingly, the Jury may be at once directed to find for the from jury. But when that result is reached by a complex view of a great variety of particulars, of which the Jury might have taken a different view, then the soundness of such a direction seems more than doubtful. I agree in thinking that this man was killed by his own But what if the Jury took a different view? It is a delicate thing, I say, that the Judge is not to allow such a case to go to the Jury. But I concur in the result of your Lordship's opinion on two grounds. 1. As a Juryman, I would not have given damages. 2. Because I have the highest confidence in the impressions made on the mind of the Judge by the evidence at the trial-impressions which are quite superior to any which we may have from the consideration of the Judge's notes of that evidence.

LORD MURRAY concurred, observing that it was a case of very great difficulty.—Exceptions disallowed.

The pursuers appealed to the House of Lords, maintaining, 1st, That it was for the Jury alone to determine what were the facts proved by the evidence; 2d, Because it was incompetent for the Judge, on any view which he might himself take of the state of the facts, to withdraw the case from their consideration; and, 3d, That the assumption by the Judge was not supported by the evidence.

LORD CHANCELLOR.—My Lords, this action was brought upon this ground, that this unfortunate man had come by his death by reason of the masters, through their agents having carelessly left a very large stone in the roof of a mine in so dangerous a position that the workman, when engaged in digging out the coal, owing to their negligence, lost his life. There being no doubt that the poor man did lose his life by this great stone falling upon him, which killed him on the spot, in order to recover damages the family must establish two propositions. First of all, they must shew that that stone was in a position in which it was dangerous, owing to the negligence of the master, and next, that the workman whose life was forfeited lost it owing to that negligence, and not to his own rashness. It is said that, by the law of Scotland, the master is bound to provide against the rashness of the workmen, and I see, in one of the learned Judge's opinions, an expression which might give countenance to such a notion. That is evidently a proposition which, as matter of law, can never be sustained. In England, and in Scotland, and in every civilized country, a party who rushes into danger himself cannot say, "that is owing to your negligence." As a question of fact.

WALLACE &Co. Liability for sufficiency of roof of a coalmine-withdrawing case from jury.

Muss or Pa- it may very well be laid down that that which would be negligence. and reasonably treated as rashness in other persons, may not be fairly treated as rashness in a workman, if his master knows that such conduct is what workmen ordinarily pursue. That is all the learned Judge could have meant. The pursuers here must make out that the deceased came to his death owing to the stone in question having been improperly left to remain where it was, being dangerous to the persons who should work in the pit. Secondly, that the party has come to his death in consequence of that negligence. and not by his own rashness. Now, to establish these two propositions, several witnesses were called. The first witness was William Paterson, the son of the deceased, and he says that Snedden was the under-ground manager, and amongst other statements it seems that, first of all, there had been some dispute about not going to work that day—the manager advised them to come back—thev did come back, and Paterson amongst them—they all pointed to the roof as being in a very dangerous condition, particularly that stone. Snedden said, 'I was afraid of snow when none fell.' The jury would clearly understand from that, or at least they might understand from it, that he meant to say,—' You are calling out before you are 'hurt,' or some expression of that sort—there is no reason to apprehend anything; you are crying out before there is any real danger. Then Paterson, the deceased, remonstrated and said, 'It is danger-Mr. Bovill says he means the roof generally—the roof generally included the stone. The other side said it meant the stone in question; but whichever way that is, one way or the other, they say it is dangerous. To which the manager said, 'Why, Robin, you ' might make your bed below it,' evidently meaning to say, there is That is the way the matter is introduced, and afterwards no danger. there is farther remonstrances, and Snedden agrees that it shall be removed, and sends down persons to remove it. In the meantime Paterson goes on working, and not waiting till the stone is removed. He gets a hutch or load of coal, and passing under the stone he is unfortunately killed, by the stone falling at that very moment, just before they were going to remove it. Now, my Lords, it is not for your Lordships, or for the Court below, to say what would be the conclusions at which the jury would arrive, or ought to arrive, upon that evidence. Upon the two propositions, all that your Lordships have to say is, or the Court below had to say was: Is there evidence that may by possibility justly lead them to a conclusion in favour of the plaintiffs upon both these propositions? Is there evidence which might reasonably lead them to come to a conclusion, that this stone was there improperly, owing to the negligence of the master? And, secondly, that there was no extraordinary rashness in Paterson's carrying his load of coals under it before it was removed? Then there was evidence of the stone being dangerously left, or rather improperly left, which is, unfortunately, too clear, from the fact that it did fall and kill one of the workmen. There is abundance of evidence on that The only other evidence, therefore, which it was necessary for the plaintiffs to lay before the jury was, that the stone falling upon him and killing him was the result of his fairly trusting that

warned not to go. My Lords, it is sufficient to say upon that sub-TERSON v. WALLACE &c.

Tect, that there is a conflict of testimony. Lord Cockburn remarked, Liability for that the Lord Justice-Clerk, who tried the case, had the benefit of sufficiency or seeing the demeanour of the witnesses—he clearly had. But how roof of a coat when we know that, from the demeanour of the witnesses, the jury drawing case might not have come to the conclusion that all the evidence was from jury.

concocted evidence—that it was not to be trusted? If the witnesses said anything about rashness on the part of Paterson, the jury might have come to the conclusion that Snedden had told him there was no real danger, but he would have it removed to satisfy all scruples. That is the conclusion to which the jury might have arrived—there was plenty of evidence of it—there was that evidence to which I have already adverted, and if there was any evidence that is quite sufficient. If I were asked upon this case to come to a conclusion upon this written evidence, whether there was rashness or not, I believe the evidence in favour of rashness on the part of Paterson strongly preponderates. I am not the jury, and your Lordships now representing the Court are not the jury. The question is, What ought to have been said by the Judge to the jury after this evidence had been given? To my mind it is perfectly clear, that it was his duty to point out to them the evidence which bore upon these two propositions—whether there had been a want of timeous removal, as they call it, on the part of the master? If you are satisfied that there was want of timeous removal, then are you satisfied that Paterson came to his death, not owing to his own extraordinary rashness. but owing to his having so implicitly relied upon the assurances which were given to him by Snedden. That is the direction which ought to have been given, then whichever way the jury had found, probably there would have been nothing upon the face of the record to lead to the conclusion that the evidence was wrong either one way or the other. If there was anything wrong it would have been set aside by a new trial, and not by a bill of exceptions. It appears to me, therefore, that that is the direction which ought to have been My Lords, it appears to me, upon the whole, with all deference to the learned Judges, quite clear that they have misunderstood the province of a Judge in a trial of this sort. He ought to have laid down to the jury what were the propositions, in point of fact, which the pursuers ought to have found, in order to entitle them to That consisted in two facts—first, whether there had been negligence-next, if the accident was the result of that negligence, and not the result of unjustifiable rashness. If they were satisfied on both of these points, the pursuers were entitled to recover. the pursuers failed to prove either of these points, the defenders were entitled to a verdict. He might have added his opinion, that the weight of evidence was irresistibly strong upon the part of the defenders, but that, after all, would be a question for them to decide.

LORD BROUGHAM.—I take exactly the same view of this case as my noble and learned friend. No doubt, if I were to ask for a confirmation of my opinion, that there was miscarriage in the Court be-

TERSON v. WALLACE & Co. Liability for sufficiency of roof of a coalmine-withdrawing case from jury.

Mulk or Pa- low, I should scarcely go farther than what fell from a very able and learned Judge in deciding on the case-Lord Cockburn. It is impossible to read Lord Cockburn's statement without seeing that this was a case which ought to have been left to a jury. I think if Lord Cockburn had applied his usual sagacity and acuteness to the whole matter, he must have seen that the very view which he took of it rendered it a case where the Judge ought not to have withdrawn the matter from the jury. My Lords, as it is the opinion of my noble and learned friend that this interlocutor overruling the exceptions should be reversed, I am loth to give any opinion on the facts of the case, because it must go to a new trial; but no person can read the evidence of Bernard O'Neil, together with the rest of the evidence, and not have a very strong opinion as to the delay which was interposed by the Company, or by Snedden, the manager of the Company, for whom the Company, undoubtedly, are responsible in this respect, though we, as my noble and learned friend so justly said, know too little of what a roadsman is, to accurately ascertain how far the Company are responsible for what the roadsman did or omitted Snedden was the manager of the Company, and, beyond all doubt, for his negligence the Company are liable. It is clear to me, on reading this evidence; that he did not take proper precautions with respect to the stone; that Bernard O'Neil, who had got directions. had not got such directions as to make him speedily remove it. says: 'I did not go to take it down; I got an empty hutch for him ' (Paterson), and both went in together. He yoked to fill the hutch 'and take away coals—I told him to do so first—then, when filled, 'I intended to take down the stone, but it fell first.' It is quite clear that they had not seen the danger, as appears from what Snedden said to Paterson, in a right point of view: that what Snedden observed with respect to Paterson making his bed, did not apply to that stone in particular—it applied to the whole roof. They felt a great deal too much confidence in the roof to make those give the directions which they ought to have given. His Lordship said he hoped what was said would induce the defenders to avoid a new trial. by an offer of compromise to the appellants.

Interlocutors reversed and case remitted, with a declaration.

A second trial took place on 12th January 1855, before the Lord Justice Clerk, on the same issue as formerly, and the jury again found for the defenders. A bill of exception was taken by the pursuer to the law laid down by the Judge at the trial, and a motion made for a rule to shew cause why the verdict should not be set aside as against The pursuer contended for a direction in point of law, that if it was Snedden's duty to have the stone removed, and if Paterson was working in course of his employment for that day with the consent, or on the orders of the defenders' manager, it was immaterial that he, Paterson,

might have reason to believe or suspect the place to be dan- Muir or Pagerous. But the Lord Justice Clerk referred this direction, WALLACE &Co. for the importance of his knowing the place to be dangerous, Sufficiency of depended on the appearance and extent of the danger at roof of a coalthe time, and the way in which that danger was at the time drawing case brought before him, whether for instance by directions to from jury. stop work on account of the danger, until the loose stones were removed.

The Court, (on 7th March 1855, D. 17, p. 623,) disallowed the exception.

LORD MURRAY.-If Snedden allowed Paterson to work where it ' was dangerous to work, he was doing wrong, and subjecting his ' master to a claim of damages, who is liable for his servant's neglect ' when an accident occurs from any known danger, or insufficiency of the works. But I cannot go the length of saving, that it is alto-'gether immaterial whether the workman himself was not aware of ' the existence of danger, and rashly exposed himself to it. Though the master is responsible, there may be such improper and reckless 'conduct on the part of the workman in exposing himself to danger as may relieve the master from liability from the consequences of 'an accident. If the works are not safe, the master is exposing his workmen to a peril which he has no right to do; but there is also 'a duty on the part of the workmen to take care of themselves.' On the motion for a rule to shew cause why the verdict should not be set aside as contrary to evidence, the Court set aside the verdict. Lords Murray and Cowan being of this opinion. The Lord Justice Clerk, contra. Lord Wood absent. The rule was made absolute for a new trial on payment of previous expenses.

A third trial took place at the Glasgow Spring Circuit, before Lord Handyside, when the jury returned a verdict for the pursuer. Damages £25. This verdict was applied by the Court, and the point of expenses of the whole proceedings disposed of on 22nd June 1855. D. 17, p. 982.

18th Jan. 1854.—Couch against Steel.—(Q. B.,) 22 L. T., 271.

COUCH V. STEEL. Whetherowner liable for da-mages caused

The plaintiff sued for damages against the owner of the by unseaworthiness of a ship ship 'Persian,' with whom he agreed to serve on board from and want of England to Calcutta:—on two grounds,—1st. Because the medicine on board. so negligently, improperly, and insufficiently equipped and fitted said ship, that she was unseaworthy and unfit for the voyage, and that thereby, and by reason of the

COUCH v. wet, the plaintiff was unable to sleep in his hammock, and Whetherowner became sick and ill and suffered greatly in his health. liable for da- 2nd. The defendant had neglected to provide and keep on by unseawor- board a sufficient supply of medicines suitable for the voyage, —and want of and that by reason thereof, plaintiff was prevented from medicine on being cured of his sickness, and suffered great pain.

The defendant denied the relevancy of both grounds. The Court sustained the objection as regarded the first, but held the second count relevant.

LORD CAMPBELL, C. J.—As to the first charge, it seems to me that this declaration does not disclose any contract or duty, the breach of which is the foundation of the complaint therein. anything that appears to the contrary, the defendant was entirely ignorant of any defects in the ship, and the plaintiff may have examined the ship, and may have become aware of its condition before the voyage commenced. Moreover, if both parties were aware that the ship was unseaworthy, it might have been the intention of the parties, that in consideration of having to undergo greater hardship, the plaintiff should receive higher wages. That being so, and there being no scienter (averment that defendant knew of the unseaworthiness,) alleging that the defendant knew of any defect in the ship, or any personal blame imputed to the defendant, the defendant is not liable. If otherwise he would be liable to an action at the suit of every seaman who was on board, if, while the ship was going out at Plymouth Sound, a bolt had started, or through any act of negligence, the ship had not been seaworthy, within the strict meaning of that term in a policy of insurance. It is admitted, that up to this time there has been no action of this nature, that it is one of the first Even the dicta of the Judges in Gibson v. Small, 21 L. T., 240, do not go the length of asserting, that a ship for the purpose of a contract of service, must be absolutely seaworthy, as it must upon an undertaking of a policy of insurance. The authorities so far as they exist are the other way. Whether the services of a party are engaged in a house or in a ship the obligation is the same.

On the second point, his Lordship held that the plaintiff did not allege any duty on the part of the defendant to supply medicines for the use of the ship's company; but he relied upon the obligation cast upon the owner by 7 and 8 Vict., c. 112, sect. 18, which enacts 'That every ship navigating between the United Kingdom, and any 'place out of the same, shall have, and keep constantly on board 'a sufficient supply of medicine and medicaments suitable to accidents and diseases arising on sea-voyages in accordance with a scale 'assigned by the Admiralty, (and now by the Board of Trade, 13 and '14 Vict., c. 93, sect. 64;) and in case any default shall be made in 'providing and keeping such medicines, &c., the owner of the ship 'shall incur a penalty of £20 for each and every default.' And by

sect. 62, the penalties may be recovered at the suit of any person, and when recovered, shall be applied and paid, a part to the informer, Whetherowner and the remainder to the Seaman's Hospital Society. Were it not liable for dafor the penalty to which the owner of the ship is subjected, it seems mages caused clear that the action would be maintainable. The enactment pro-thiness of a ship vides a benefit for the seaman, and according to the plaintiff's alle-—and want of gation the defendant has violated that enactment, and thereby the medicine on plaintiff, being a seaman on board, was deprived of that benefit. and board. his health has been injured. The general rule is, wherever a man suffers temporal loss or damage by the wrong of another, he may have an action of damages. Now, no authority has been cited to us, nor are we able to find any in which it has been held, that in such a case as the present, the common law right to maintain an action in respect of special damage resulting from the breach of a public duty, whether such duty exists at common law, or is created by statute, is taken away by reason of a penalty recoverable by the common informer being annexed, as the punishment for non-performance of the public duty. In the present case, if the statute had prescribed a particular mode by which the person sustaining actual damage, by reason of a breach of the duty imposed by statute, was to receive compensation, undoubtedly that mode only could be adopted. the statute has made no provision for compensation to persons sustaining special damage by reason of a breach of duty prescribed by the Act; nor are there any words taking away the right the injured party would have at common law to sustain an action for special damage arising from the breach of duty, the penalty given by the statute being applicable only to a public wrong, and not to private injuries. We think, therefore, the action here is sustainable.

COUCH v.

30th Jan. 1854.—Dansey against Richardson.—13 L. J. Bichardson. (Q. B.,) 217.

Liabilityon employer for neg-ligence of ser-

Defendant kept a boarding-house, and plaintiff had boarded vants. in the house for some weeks. A butler and page were kept to go errands for the boarders, carry luggage, &c. was about to leave the house, and her luggage had been carried down to the hall door to be ready, when plaintiff The butler left the sent the butler out for some biscuits. front door a-jar, and while absent, a thief took the opportunity of carrying off a valuable dressing case. The plaintiff sued the boarding-house keeper for the loss. The Judge at the trial told the jury that defendant was not bound to take more care of her house and things in it than a prudent owner would, and it was for them to say if defendant shewed

DANSEY v. RICHARDSON. ployer for neg-ligence of servanta.

any negligence in hiring and keeping the servant. Verdict Liabilityonem for defendant.

> Afterwards a new trial was moved for, on the ground of mis-direction, and the case was twice argued on account of its difficulty.

> The Court of Queen's Bench was equally divided. J., and Wightman, J., being in favour of the Judge's ruling. and Lord Campbell, C. J., and Coleridge, J., contra, so that no new trial was granted.

The law was thus laid down by-

LORD CAMPBELL, C. J.—I think the questions to be left to the jury were, whether the door was left open, and whether there was a want of ordinary care and diligence in so leaving it open, whereby the property was lost. The distinction taken between the negligence of the servant in leaving the door open, and the negligence of the defendant in hiring or keeping the servant, it seems to me, cannot be supported. Wherever the loss of the thing bailed arises from a want of the degree of care, which, from the nature of the bailment, ought to be exercised. I think it immaterial whether the negligence be imputable personally to the bailee or to the servants employed by It was very truly observed at the bar, that this was not the common case of depositation, and that the duty of the defendant was not that of a bailee, to whom a chattel is personally delivered, to be safely kept and returned for reward. But there was a duty incumbent upon the defendant as keeper of the boarding-house, with respect to the plaintiff's goods, when they were lawfully deposited in the hall, and even while they remained in the room appropriated to the plaintiff; and I think it was a breach of that duty, if through the gross negligence of the defendant or her servant, the outer door was left open at the time, when thieves might be expected to enter the house, and by means whereof, the goods were stolen. The luggage of a passenger by railway, though never delivered to any servant of the Company, and remaining in the personal keeping of the passenger during the journey, is nevertheless, in point of law, in the custody of the Company, so as to render them liable for its loss, by the negligence of their servants. Great Northern Railway Coy. v. Shephard, 8 Exch., Rep. 30. But in the present case the jury were told to find for the defendant, although the loss arose from the negligence of the servant, and although there was negligence on the part of the plaintiff, if the defendant was not guilty of negligence in hiring or keeping the servant. This amounts to the doctrine, that the boarding-house keeper cannot be liable for the negligence of the servant however gross, which causes the loss of the goods of the guest, if the master cannot be justly accused of negligence in hiring and employing that servant. To this doctrine I cannot accede. by no means suppose that a boarding-house keeper is liable for a loss

of the goods of the guest by theft, where there has been no negli- Dansey c. gence. Robbery, according to the latter opinion, would excuse even Richardson. an inn-keeper, although not a common carrier. But the loss here is ployer for negalleged to have arisen from the gross negligence of the servant, for ligence of serwhich I think the boarding-house keeper may be liable without vants. xproof of previous knowledge of any deficiency or evil habit in the Servant

8th February 1854.—ROBERT BAIRD. Pursuer, against ADDIE & MILLAR, Defenders.—D. 16, p. 490.

BAIRD V. ADDIE AND MITTAD. Liability for damage from damage

The pursuer was a miner in the employment of the de-fire-damp in a fenders, who are coalmasters in Old Monkland. In conse-and raised an action of damages against the defenders. appeared that the pursuer and other three workmen were employed by the defender to drive a mine in one of their pits at a certain rate per fathom, and they were paid for the work so performed on each pay-day along with the The contract contained no other workmen in the pit. stipulation on the pursuer and his fellow-workmen that they should keep up the brattices, or otherwise make provision for the due ventilation of the mine, and in the absence of such stipulation, the Sheriff found that it was the duty of the defenders, according to the general practice and understanding of such arrangements, to do so. The pursuer and his fellow-workmen went down into the pit between seven and eight o'clock in the morning, being about two hours before the general hour of beginning to work, and while in the pit on their way to the mine, and with a view to commence their work, they came in contact with a body of fire-damp, or other inflammable gas, which immediately exploded, and in consequence thereof the pursuer sustained severe bodily injury, and was rendered incapable of working for a considerable time. The Sheriff found, on the proof, that the brattices and air-courses, for securing the ventilation of the mine, were in certain parts unsafe and insuffi-That it was usual in the pit, which was known to be subject to fire-damp, to have it examined every morning before the working commenced, but no precaution had been

BAIRD v. ADDIE AND MILLAR. Liability for damage irom coal-pit.

taken on the morning of the accident to examine the mine. or to warn the pursuer and his fellow-workmen against the existence of fire-damp in the pit. The defenders had entered fire-damp in sinto a contract with John Hendry to put out the ironstone from the pit, and to attend to the workings in the pit, but that the said John Hendry did not hold that it fell within his contract to look after the brattices or ventilators, in so far as necessary for the safety of the pursuer and his fellowworkmen in driving the mine.

> It also appeared, from the evidence, that the accident occurred on a Tuesday morning, and that the working of the pit had been discontinued since the previous Fridaythe pit having been standing that time in consequence of the boiler of the engine requiring to be cleaned. stated by the defender, that although the pursuer and the other workmen knew that, when a pit was allowed to stand over for a day or two, there is a greater probability of foul air or inflammable gas accumulating than when it is going regularly, the pursuer and the other workmen went forward to the mine with naked lamps; and in consequence of this foolish, culpable, and reckless conduct, the accident occurred by which the pursuer sustained the injuries. peared in the evidence, that the person whose duty it was to see to the safety of the pit, did not warn the pursuer and the other workmen of any danger, although they passed him at the bottom of the shaft when going to the mine. The Sheriff-substitute (Smith) assoilzied the defenders, on the ground that the contractor had taken the responsibility of keeping up the air-courses and seeing that the pit was well ventilated. The Sheriff (Alison) reversed this judgment, and found £25 of damages due, with expenses. defenders advocated, and the Lord Ordinary adhered. defenders thereafter reclaimed, pleading that the pursuer was barred from claiming damages, in respect he had himself been guilty of negligence in reference to the accident, which would not have happened had he exercised due and ordinary care; and, 2d, If negligence was imputable to any other party, it was to the contractor or his foreman, and that the defenders were not responsible for the negligence of contractors or persons in their employment.

suer pleaded generally, that the defenders having employed him in the pit, they were bound to have it properly ventilated, and were liable for the neglect of the contractors or Liability for damage from other servants in regard to it.

BAIRD #-ADDIE AND fire-damp in a coal-pit.

LORD PRESIDENT.—I think the interlocutor of the Lord Ordinary The injury to the pursuer was caused by the substantially right. explosion of fire-damp in the underground works, and the evidence instructs that the ventilation there was not properly attended tothat the machinery was not in proper order. I think that the explosion is to be ascribed to defect in the ventilation, and it will not do to say that it was owing to some other cause. That argument might have had effect, if there had been care paid to the ventilation. but not where there was not that care. Therefore some person is responsible for that state of matters. Again, I think it is made out that there was no previous examination in the morning of the aircourses, and no notice to the workmen of danger. That is also a wrong for which some person is responsible. Farther, I think the defenders are responsible both for the defect in ventilation, and the neglect in the management of the air-courses. It was their duty to attend to both these matters. The ventilation of the mine was not devolved on other parties; it was no part of Hendry's contract; and quoad that, his workmen were the servants of the defenders. as in a question with the pursuer.

As to the inspection of the works, and the notice to the pursuer of danger, it was clearly the duty of the defenders to provide for that, and whoever they devolved it on, was their servant so far as concerned the pursuer. The defenders are responsible for all these matters. It was their duty to take care that the ventilation was correct, that the machinery was in a proper state, and that there was a proper inspection. If it had been devolved on the pursuer himself to maintain the ventilation, then he failed in his duty to himself, his master, and his companions. But that is not the case, and therefore I think the interlocutor is substantially correct. Although the pursuer was rash, I do not think there was any ground for denying him full expenses in this matter. The damages are very moderate.

LORD RUTHERFORD.—If the pursuer is not himself to blame for the injury, the only question is whether the defenders are liable, and the only point made to evade liability is this, that under a previous contract they had devolved on Hendry the charge of the air-course of the whole pit. Be it so. But the pursuer did not contract with Hendry; on the contrary, the defenders were the parties who directly contracted with the pursuer. In these circumstances, to whom was the pursuer to look for safety? To the defenders with whom he contracted. Hendry was responsible, not to the pursuer, but to the defenders, and the pursuer was entitled to look beyond Hendry and to his direct employers for safety. When they told him to go down to that mine and work it, they guaranteed the safety of access. Suppose the ropes had been defective, the defenders were

liable for the result. The pursuer had no question with Hendry at RAIRD # ADDIE AND all—he had to deal only with the defenders. The Court, by a special interlocutor, adhered to the finding of Liability for The Court, by a spec damage from damages, with expenses. fire-damp in a coal-pit.

ECUTORS v. RODGER AND Sons. Injury by ma-chinery—fault on part of pur-

NEILSON'S Ex-17th February 1854.—Neilson's Executors. Pursuers. against WILLIAM RODGER & SONS, Defenders. Jur. 26, p. 273. p. 603.

> This was an action of damages originally at the instance of Margaret Neilson, a worker at the defenders' works at Bleachfield, Carmyle. She had come in contact with the machinery in the works, from the effects of which she died: and the issue was, 'Whether the said accident was occa-' sioned by the negligence or unskilfulness of the defenders, ' or others for whom they are answerable, in the construc-' tion and management of their works, and the machinery ' therein, or part thereof, to the loss, injury, and damage of 'the said Margaret Neilson, and of the pursuers in her. ' right, and as representing her.'

> It appeared from the evidence that, on the morning of the occurrence, Margaret Neilson was in the boiling-house. where she had washed herself, and was combing her hair. The bell was about to ring for the workers to return to their work after breakfast, when Margaret Kirkwood, a fellow-worker of the deceased, came into the boiling-house. and intending to go out by the back-door, which was locked and fastened on the inside, she requested the deceased to close and fasten the door after she (Kirkwood) went out. There was a horizontal shaft from the engine at that time in motion in the boiling-house, about three feet from the floor between the girls and the door. Kirkwood stooped below the shaft, and was followed by the deceased. two girls opened the door, but Kirkwood only went out, The deceased returned below the shaft stooping, and in doing so she was caught by the hair, and the shaft turned her round thrice before it could be stopped. She died of All the witnesses deponed that it was conthe injuries. trary to the orders of the defenders to be in the boiling

house, or to use the door which had been opened by Neilson's Exdeceased and Kirkwood; and it was proved that the deceased RODGER AND RONS.

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knew this.

The Lord Justice Clerk (Hope) intimated that he must, chinery—fault in the state of the facts proved, direct the jury, in point of suer. law, that they must find for the defenders, and did so direct the jury. The Lord Advocate, for the pursuers, excepted to the said direction, and to the evidence being withdrawn from the consideration of the jury. In obedience to the direction, the jury found for the defenders. The exceptions were afterwards argued, and disallowed by the Court. At advising.—

LORD COCKBURN was of opinion that the exception should be allowed. There was no doubt that the deceased had been killed by injury received at the defenders' works. The true question put to the jury, and on which the parties differed, was, whether the injury was caused by the negligence of her masters. These masters maintained that it was caused by her own negligence. Upon this, including the cross-examination, there was opposite evidence; and from what transpired in the discussion of the bill, something might have depended on the comparative credibility of the witnesses.

Now, when a judge trying a cause is of opinion that there is no evidence to go before the jury, it is his duty to withdraw the case from them altogether. When he thinks that the result depends on matter of law, as applicable to certain facts, the correct course is to get these facts fixed by a special verdict, or a special case, or in any other way that may be arranged, and thus to enable the Court to know what the facts are, or where the evidence seems to the judge to be so clear that it can warrant only one verdict, his course is to state this to the jury, who, if they will go wrong, can be set right by a new trial.

His Lordship proceeded to state that the pursuers did not admit the defenders' statements of the deceased's negligence as the cause of death. That they held the strongest testimony against them to be tainted by partiality, as the witnesses were in the defenders' employment. That the prohibition against entering the boiling-house had been virtually withdrawn by the practice of the works. That negligence on the part of workers did not necessarily absolve masters from the duty of protecting them, to a certain extent, even from their own rashness. "It is no defence of a pit near a public way, or of a fatal trap or spring-gun, or of an unenclosed piece of dangerous machinery, that the person hurt had been warned off, or was trespassing, or drunk; and since this most dangerous place was left accessible, it depended on circumstances and on degrees whether a general order to keep out of it liberated the defenders from all responsibility. The Factory Act directs that 'all parts of the mill

Neuson's Ex-' gearing in a factory shall be securely fixed.' (7 and 8 Vict., c. 15, ECUTORS v. sec. 21). Whether this applies to a bleaching manufactory, I do RODGER AND SONS. not at present know, but I am certain that our common law sup-Injury by ma-plies us with a similar principle. Now, what shall be deemed secure fault fencing is surely a question for a jury. The correct charge would on part of purhave been for his Lordship to have told the jury, that if on the evidence they believed that the deceased had been killed by her own negligence, they must find for the defenders; and if they believed that her death was owing to the negligence of the defenders, then they must find for the pursuers.

> LORD MURRAY.—I agree that if a pursuer has brought facts, the jury are the sole judges of what is proved or not proved. here the issue is, whether the accident was occasioned by the negligence or unskilfulness of the defenders, or others for whom they are answerable? If the pursuers had proved anything to shew negligence or unskilfulness, they were entitled to go with that evidence before But I find nothing before the jury from which negligence the jury. or unskilfulness could be inferred. On the contrary, I find much No doubt it is an extreme case only in which a the other way. judge can interfere, and vet it is common enough in England. There are frequent instances in that country of cases determined on what is called a nonsuit. If there be any case at all, the judge is bound to let it go to a jury. But here there is not a particle of evidence to shew negligence on the defenders' part, or bad construction of their machinery, to account for the accident. It appears that it was not the practice for girls in the defenders' employment to go into the room where the accident occurred, and the workers were forbidden Are the defenders responsible for the pursuer's disobedience of orders, or is it any answer that the door was not so fastened as to prevent her getting there? A shopkeeper leaves his till unlocked; is it therefore lawful to take money out of the till? It is quite clear that farther evidence was required to make out a case sufficient to go before a jury. It is no doubt a delicate and difficult duty which a judge has to perform in withdrawing a case from a jury, but I never saw a weaker case presented by a pursuer than the present.

> LORD WOOD.—It was said that the pursuer had stated a relevant case of fault on the part of the defenders, and having got the issue which was sent for trial by a jury, and led evidence upon the facts of the case, they were absolutely entitled to a response by the jury to the issue, however clear it might be in the opinion of the presiding Judge, that the case upon the evidence was not sufficient in law to entitle them to a verdict. It is obvious, that when stated in this way, the pursuers' proposition would exclude a case ever being taken from the jury. But inveterate practice and authority establishes that there are cases in which all consideration of the evidence on the part of the jury may competently be dispensed with, and where no response is given by them to the issues but one in point of form. what was done in the present case. The question, or at least the first question, and the one which originally was pressed upon the Court,

by the pursuers, as this only ground of exception is- 'Had the NEILBON'S Ex-'Judge the power in point of form to do it, or was it positively in- ECUTORS v. competent. It is an entirely separate matter, whether although NORMAN SONAL competent in form there may be room for exception, if it can be Injury by masshown that a mistaken view was taken of the evidence, and that it chinery, fault on part of pursuing to have been left to the jury. His Lordship proceeded to suer. shew the competency of the course taken by the presiding Judge, and the propriety of it on a review of the statements in the case, and the evidence offered, and thus concludes,- 'After attending to all that 'the solicitor stated on the subject, and on a careful perusal of the ' proof. I shall only say that I have not been able to discover any-'thing in it, which to my mind suggests any reasonable doubt, that the opinion formed by your Lordship of the evidence is well founded. I can see nothing in it which can render it a fair subject for being weighed by a jury. As I read it, it is all one way as ' respects the matter, which makes the relevancy of the pursuers' There is in it nothing applicable to that portion of the case 'except to contradict it; and I should say, that even if the evidence ' had not gone so far as it did, but had been confined to a portion of the facts which it discloses, there would have been enough to amount to a complete failure on the part of the pursuers.' In the words of Lord Moncrieff, already quoted, the case is simply this, 'that they have failed to prove the only case undertaken in the ' issue, or rather have actually proved a case inconsistent with it, on ' which the Judge must of necessity direct the jury, that in point ' of law they can obtain no verdict.

Upon the whole, then, in whatever view the pursuers' exception

is put, I am of opinion that it ought to be disallowed.

This opinion was pronounced after the reversal in Muir or Paterson v. Wallace and Co. -ut supra, p. 179.

10th June 1854.—Bernard Swift, Pursuer, against Andrew Christie, Defender.—26 Jur., p. 483.

B. SWIFT v. A. CHRISTIE. Master and servant's respon-sibility of form

The pursuer was a workman in the Town-hill Colliery in of Issue. October 1850, when a part of the roof fell in and injured his leg, so that amputation was necessary. The defender was proprietor, or lessee of the colliery. The defence was, that at the time of the accident the pit was in the hands of James Izatt, a contractor, that the defender had no connection with the management or mode of working the pit, that he was not the pursuer's employer, and that the occurrence whereby the injury had been occasioned was an accident for which no blame could be imputed to any one.

bility and form of issue.

The pursuer proposed this issue,—'Whether the said in-A. Christie.

Master and ser-' juries were sustained by the pursuer while employed in vant's responsi-, the service of the defender, and were occasioned by the 'unsafe and insufficient state of the roof of the said pit. or ' part thereof, and by the fault, negligence, or unskilfulness ' of the defender, or of another or others for whom he is ' responsible, to the loss, injury, and damage of the pursuer.' The defender proposed the following issue.—'Whether the ' pursuer was in the employment of the defender in the month ' of October 1850, and whether, while in the defender's em-' ployment, the pursuer in the course of said month of 'October 1850, sustained a personal or bodily injury in the 'Crawford Pit foresaid, through the fault of the defender-' from the insufficient state of the roof of the said pit.' pursuer maintained that his issue was one often adopted for the trial of such cases. The defender contended that the one proposed by him was preferable. It was shorter, and asked generally the question, whether the occurrence took place by the fault of the defender? If it did not take place by his fault, then he is not responsible.

> LORD RUTHERFURD.—I do not see any objection to the defender's issue, if it be quite understood that the word 'fault' opens up the whole case in the record.

> LORD PRESIDENT.—As legal principles evolve themselves, we have shortened our issues. I do not see any great danger from adopting the defender's issue. I think it a great improvement to leave out the words, 'negligence' or 'unskilfulness.' I think the dropping of the words 'or others for whom they are responsible,' is also an

> Wood.—Will there not be danger lest the jury should think it necessary for the pursuer to make out that the occurrence arose

directly from the fault of the defender?

LORD PRESIDENT.—In any case, and even if the words proposed to be left out were retained, it would still be necessary for the Judge to explain to the jury that the defender is responsible for the fault or negligence of his servants and workmen.

Defender's issue approved of to try cause.

13th June 1854.—Lygo against Newbold.— Exch. 23., L. J., 108.

Plaintiff hired defendant, a carrier, to carry her furniture. his cart,—there from Carnaby Street to New Inn Passage. One load was tractfor person-After loading the cart a second time. al carriage. safely conveyed. plaintiff and defendant's carman both got upon the cart, While on their way a crash was heard, and the carman got Plaintiff then said if there was danger she would come down. The carman said no. and desired her to stav where she was. A hammer and nails were got and some thing was done to the cart, but after going a little distance a wheel came off the cart, and the plaintiff was thrown out and injured. The Court of Exchequer held no action lay against the carrier, as the plaintiff brought the mischief on herself, and the defendant's contract was merely to carry her goods, not herself.

NEWBOLD. Owner not liable for injuries to a person on being no con-

13th June 1854.—Theobald against Railway Passenger's Throbald v. ASSURANCE Co.—23 L. J., Exch. 249.

RAILWAY PAS-SENGER ASSUR-ANCE CO.

The plaintiff had insured his life for one year with de-dent—damages fendants for £1000, by Insurance Ticket, premium £1. jury only—not The ticket bore, that the above sum would be paid to his for loss of time. representatives in the event of death happening to the insured whilst travelling in any class carriage on any line of railway in Great Britain and Ireland, or a proportionate part of the said £1000 would be paid to the insured himself in the event of his sustaining any personal injury by reason of such accident. Certain conditions attached to the ticket bore, that in case of accident, notice was to be given to the Company within a reasonable time, and in case of dispute as to the sum to be paid for personal injury, the amount was to be fixed by arbitration.

Plaintiff was a bookseller and tract distributor. the period insured, he was travelling by the Railway at Wolverhampton, where it was necessary to change carriages.

THEOBALD v. cross the line, and get a fresh ticket. He was coming out RAILWAY PAS-SENGER ASSUR- of the carriage for these purposes, when his foot slipped from ANCE Co. the step, which was wet with a recent shower, and he fell dent—damages between the carriage and the platform and injured his leg. jury only—not He brought this action accordingly. The jury found there for loss of time. was no negligence on plaintiff's part, and gave him a verdict of £134, 19s. damages, of which £100 was for loss of time and profit on his business, the rest for expenses caused by the personal injury.

The defendants afterwards moved to have the verdict entered for them (pursuant to leave reserved at the trial.) on two grounds, (1.) Because this was not, strictly speaking, a railway accident at all, and did not come within the meaning of the policy; (2.) Because the jury ought not to have given damages for loss of time and profit in business, but that all that could be recovered was expenses caused by the personal injury.

The Court of Exchequer held it was a 'railway accident' but that no damages for loss of time or profit could be recovered.

Pollock, C. B.—The first question is, whether this is a railway accident within the meaning of the policy, and we think it is. I do not know whether we are called upon to lay down any rule beyond what is necessary to decide this case, and it would be very unsafe if. on a single instance brought before us with certain circumstances. not all of them of a perfectly general nature, we were to lay down a rule that is to govern all cases. On the present occasion, however, it is quite plain that the plaintiff was a traveller on the railway, and though in one sense the journey had terminated by the carriage having stopped, the plaintiff had not at the time of the accident ceased to be connected with the carriage, by being still upon it. He was stepping out of it when this occurred, and, as the jury have found, without any negligence or culpable inattention to his security. He was doing an act which, as a passenger, he must necessarily do, for every passenger must get into a carriage, and out of a carriage when the journey is at an end, and he can hardly be considered as disconnected with the carriage and railway, and with the machinery of motion, until the time when he has safely landed, as it were, if we may use that expression, from the carriage and got upon the platform; while in the act of leaving the carriage this accident occurred, and it is attributable to his being a passenger on the railway, and it arises out of an act immediately connected with his being a passenger. Under these circumstances, we are of opiniou that this was a railway accident within the meaning of the policy, and that the action was

maintainable. As to the other question, that of damages, we are of THEOBALD v. opinion that whatever be the object of the insurance, whether with RAILWAY PASreference to death or any accident inflicting an injury short of death, ANCE Co. the injured party must receive the same consideration, and in esti-Railway accimating the damage and injury done to the traveller, the consequendamage and injury done to the traveller, the consequendamage for personal interesting tial mischief of losing some profit is not to be taken into considerating only—not tion, otherwise a passenger, whose time is more valuable than another, for loss of time. would, for precisely the same personal injury, receive a larger remuneration than another whose time would be of less value. What the Insurance Company calculated upon indemnifying for is the expense of pain and loss, it may be of a limb, connected with the immediate accident, and not the remote consequences that may follow, according to the pursuit or profession which the passenger may be following. We think, therefore, that the verdict must be reduced to £34 19s.

ALDERSON, B.—It was contended that the estimate of the damage in case of personal injury must bear the same proportion to the amount insured in case of death, as the injury caused by the accident bears by the loss by death. But I am of opinion that we can institute no such comparison between the accident and the death, and that the true measure of damages is the amount of injury the plaintiff sustained by the accident, not exceeding the sum which they must have to pay in the case of death. I also think that a railway accident means an accident to a person travelling by railway, and arising out of the circumstance of that fact of travelling ending in injury, and it does not in the slightest degree depend upon any accident to the railway itself.

22d June 1854.—John Brownlee, Junior, and Curator, Pursuers, against Charles Tennant and Co., and Brownlee v. Pursuers, against Charles Tennant and Co., Brownleev.

Andrew Gardner, Defenders.—D. 16, p. 998; Jur. 26, Tennant & Co., and Gardner.

Liability for

injuries sustained on a

This was an action at the instance of John Brownlee, and railway. his father as his curator, for damages for an injury sustained on 16th March 1851.

The defenders, Tennant and Co., are lessees of a coal-pit situated on Braehead farm, near Baillieston, from which coal-pit they formed and use a private railway for conveying their coals to the Drumpellier Railway. The Drumpellier Railway is formed on an incline, and is wrought by a fixed engine from the top of the incline, and the private railway is formed on the level, and wrought by horse-power Liability for injuries sustained on a railway.

Brownles v. to the foot of the incline, where the horses are taken out of TENNANT&Co. the waggons, and the latter sent up the incline by means of and Gardner. the waggons, and the latter sent up the incline by means of the engine. This private railway passes near a parish road, and very near the house occupied by the pursuers, which is situated at the foot of the incline. The other defender. Andrew Gardner, was the contractor for the haulage of the waggons on the private railway, which he performed with his own servants and horses.

> The pursuers' averments were, that prior to the date of the injury the railway was left by the defenders. Tennant and Co., in an unsafe and insufficient state; and in particular, that the fence was broken in several places near the pursuer's house, and the breaches had been left unrepaired. in consequence of which it formed no protection to the public, and presented no obstruction to children going upon That on the 16th March 1851, the pursuer. John Brownlee, junior, (seven years of age), wandered upon the railway through one of the breaches in the fence. That on that day two young and inexperienced boys, named M'Dougall and Buchanan, were engaged as servants of the defender, Gardner, in taking charge of the haulage of the waggons on the private railway to the foot of the incline: That on the said occasion a horse with two of the waggons was allowed by these two boys to move forward, without any person to guide it; and as the pursuer, who had wandered on to the railway, was crossing the line, the horse and waggons came in contact with him, whereby he was thrown down, and the waggon passed over one of his legs, which was so injured as to require to be amputated above the knee.

> The defender, Gardner, admitted that he was contractor to Messrs. Tennant for the haulage by horses on their private railway at the time of the accident, but stated that he had nothing to do with the fences, or any other thing connected with the railway. He averred that the accident had occurred entirely through the trespassing of the child, and pleaded that, in these circumstances, he ought to be assoilzied.

> The defenders, Tennant and Co., on the other hand, pleaded that, as the injury was not caused by them or their servants,

but by a contractor, for whom they were not responsible, Brownlee v. Tennant & Co. there was no case as against them.

The Lord Ordinary repelled the plea for Tennant and Co., Liability for injuries susand the objection stated on behalf of Andrew Gardner, and tained on a allowed them to lodge a draft of such issue or issues as they might have to propose for the trial of the cause.

and GARDNER.

His Lordship stated in a note, that although the summons and revised condescendence, even with the aid of the explanatory minute, were undoubtedly loose and ill expressed; vet the substance of the advocator's statements, when sufficient trouble is taken to analyse them, appeared to amount to a relevant case for an issue.

He added—As regards the respondent, Gardner, he seems to be sufficiently brought into connection with the accident by the statement that he had charge of, and was in the act by himself, or by another or others for whom he is responsible, of performing the haulage when the accident occurred; and as regards the respondents, Tennant and Co., they seem likewise to be sufficiently connected with the accident, by the averments, to the effect that they were occupiers of the railway; that the waggons and coals were their property; that Gardner was their contractor or servant for the haulage of the waggons; and that he was performing this duty, either with his own or their horses and servants at the time of the accident. The words contractor for or in the other defender's service for the haulage of the waggons, seem to be used upon the footing that contractor and servant are to be regarded as synonymous terms, which they may possibly turn out to be, as is shewn by the cases of Rankin v. Dixon and Co., 10th March 1847, and Nisbett v. Dixon and Co., 8th July 1852. On the other hand, these terms may turn out not to be synonymous, as is shewn by the case of M'Lean v. Russell, M'Nee and Co., 9th March 1850. But all this is matter for investigation and consideration at the trial, when there may be a verdict either for or against both sets of respondents, or against one set of respondents and not against the other. On the whole, whatever may be the result of the case on the proof, the Lord Ordinary does not think that there are sufficient grounds for throwing it out of Court on the relevancy.

BROWNLER V. TENNANT & CO. Liability for injuries sustained on a railway.

Gardner reclaimed, and insisted on his right to absolviand GARDNER tor, maintaining that the pursuers had laid their case exclusively upon the insufficiency of the fencing of the railway: that that was a matter with which he had nothing to do; and that he was entitled to have the action dismissed, so far as he was concerned.

> Answered by the pursuers—The demand is premature at this stage of the proceedings, and ought not to be granted. We do not know what was the contract between the defender and Messrs Tennant, and cannot assume his nonresponsibility. Besides, in a question of civil responsibility, a party would not be entitled, in the position of the defender, to escape, because another party may not have kept the fences in good order. He was bound not to have worked the line if he could not do it with safety to the public.



LORD JUSTICE-CLERK.—The difficulty the Court feels is in giving effect to the plea for Gardner at present. It may be well-founded, but can we assoilzie him now, and refuse an issue, before we know the facts? There may be nothing else in the case but the liability on Messrs. Tennant, but we must ascertain what the contract is, and how it stands. I propose to grant the issue at present.

The other Judges concurred.

The Court meantime granted an issue against Gardner.

O'BRYNE v. BURN. Injury from machinery— master held liable in circumstauces.

8th July 1854.—MARY O'BRYNE, Pursuer, against HENRY J. Burn, Defender, 16, D. B. M., 1025, 26 Jur., p. 559.

The pursuer, while employed by the defender in a claymill, of which he was proprietor, had her arm crushed by the machinery, and she lost the arm. An action of damages was raised at her instance. The summons set forth that she entered the defender's service in September 1852 as a worker in his clay-mill, situated near Crossgate, in Fifethat she had only been nine days in the work at the time of the accident, so that she was inexperienced in regard to the risks from the machinery—that James Anderson was entrusted by the defender with the charge of the machinery. the superintendence of all the operations connected therewith, and the charge and superintendence of the pursuer and

the other girls employed at the work, and with the duty of O'BRYNE v. seeing that all the operations were safely and properly con-Injury from ducted—that the pursuer was chiefly engaged in bringing masterheld liaforward the prepared clay for the purpose of its being ble in circumpassed through the rollers—that it was part of Anderson's own duty to have removed at intervals the waste clay which did not pass through the rollers—that this removal could only be effected safely after taking off the clutch which connected the rollers with the other machinery, or by stopping the steam engine by which the whole was put in motion: but that on the occasion libelled Anderson ordered the pursuer to remove the waste clay without at the same time suspending the motion of the rollers, by taking off the clutch or stopping the engine, the consequence of which was that the pursuer's right hand was drawn in between the rollers, and was with part of her arm crushed so as to render immediate amputation necessary. It was further set forth that even if a person of skill and experience might have succeeded in removing the waste clay while the rollers were in motion. the operation was one of such risk and hazard that no inexperienced person, like the pursuer, ought to have been ordered to engage in it. The defender contended that the statements of fact did not support the conclusions of the summons, and that no such action lay at the instance of a servant against his employer, founded solely on the alleged fault or negligence of a fellow-servant, and not at all upon any breach or neglect of duty on the part of the employer.

The Lord Ordinary sustained the relevancy and appointed He said—'It is contended that these statements ' do not amount to a relevant case to infer damages against ' the defender. The Lord Ordinary thinks they do. ' not necessary here to determine how far, when two or ' more servants are engaged to perform some common opera-' tion, the one must be held to take the risk of the acts or ' neglect of the other in the course of their common employ-' ment. Much must depend upon the circumstances of the ' particular case. But the present, according to the pur-' suer's allegations, is the case of an inexperienced girl 'employed at a hazardous manufactory, subject to the 'orders, and placed under the protection of an overseer

RITEN Injury from machinery— master held lia-

'appointed by the defender to act for and represent him. 'and intrusted by the defender with the duty which 'he must otherwise have performed himself, of superinble in circum-' tending the machinery, and of superintending also and 'caring for the safety of the numerous workers (many of ' whom might be expected to be young and inexperienced), ' who might be employed in such a manufactory.

> 'Although it is stated that the pursuer was chiefly em-'ployed in bringing forward the clay, and that Anderson ' ought to have removed the waste clay from the rollers, it ' is obviously implied in her whole statements that the pur-' suer was under Anderson's general order, and that it was 'not for her to judge what particular piece of work in the 'manufactory she ought to be required to perform. ' is nothing in her allegations to imply that she either was ' or supposed herself to be engaged on a footing which would ' have entitled her to disobey Anderson's orders; and sup-' posing her to be otherwise, the Lord Ordinary is not pre-' pared to say, looking to the other circumstances, that this ' would have been sufficient to exonerate the defender from ' liability.

> 'Whatever limitations it may be thought reasonable to ' place upon the liability of a master for injury done to a ' servant by the act of his fellow-servant, the Lord Ordi-'nary cannot think that these ought to go the length of ' relieving the master in such a case as is alleged here, from ' all liability for his representative acting in the exercise of 'the very authority with which the master had invested ' him.

> 'The cases in which masters have been held liable for ' loss of life or injury to the lieges by negligence, occurring ' in their absence, of servants entrusted with their horses ' and carts, show, in the first place, that it is not necessary ' there should be any implied contract between the master 'and the person injured for that person's safety (although 'even that principle might come in here), and in the second ' place, that it will not necessarily relieve the master that 'the servant's negligence may infer criminality upon his ' part, amounting even to culpable homicide.

'Without saying that in no case the general plea that

DONIAN RAIL-

'the master cannot be held liable for injury to one of his O'BRYNE ". 'servants occasioned by the fault or negligence of a fellow-Injury from 'servant may be effectual, every case must depend to a great machinery— 'extent on its own circumstances, and here, although the ble in circum-'machinery was no doubt all right, the party who is said stances. 'to have given the order, and to have been guilty of the 'negligence which occasioned the accident, was the master's 'representative, upon whom the master had devolved both ' his powers and his duties over young and inexperienced

' workers in a hazardous manufactory, whose superintendence ' was indispensable, which seems to the Lord Ordinary to ' relieve the question of relevancy from all serious difficulty.'

The defender reclaimed, maintaining, that while he did not deny responsibility for his superintendent, the pursuer attributed culpa alone to Anderson, and that therefore no blame can be attributable to the master. It is substantially an averment that Anderson acted in violation of the defender's orders.—The Court adhered.

7th July 1854.—John Hill, Pursuer, against The Cale-DONIAN RAILWAY Co., Defenders.—26 Jur. p. 553. D. 17, HILL v. CALE-

The pursuer was engaged at the goods traffic department less placing of of the Caledonian Railway for the purpose of collecting goods at a rail-accounts, conveying goods to the station and traffic department less placing of goods at a rail-accounts, conveying goods to the station and traffic. any other duties which those in authority over him might direct; that he was subject to the orders of Matthew Foulds, the goods manager, whose son had the general superintendence on the part of the defenders; and that he was ordered by young Foulds to take the numbers of the waggons and sheets, and label the waggons standing at the station shed. He alleged that, while he was in the performance of this duty, a chest of drawers fell upon him from the platform, a height of about four feet, and so crushed his ankle as to render him lame for life: that the chest of drawers had been placed there by the servants of the Glasgow and South-western Railway Company while the pursuer was absent at dinner, or collecting goods, and was so near the

DONIAN RAIL, Liability for injury by care way station.

HILL v. CALE- edge of the platform as to be liable, in consequence of one of the back feet being off, to be easily thrown down by the shaking of the platform, upon which it had stood in the deless placing of fender's custody, for transmission, for a considerable time before the pursuer entered the goods shed: that the immediate cause of the falling of the chest of drawers was the shaking of the platform, occasioned by the unloading of goods upon it, the backing of carts against it for the unloading of goods upon it, or such other operations necessarily occurring in the goods shed of a railway company; or by the violent and riotous conduct of certain carters or porters in the employment of the defenders. The accident arese from the culpable negligence and mismanagement of the defenders, or their servants, or from the culpable, and violent. and riotous conduct of those for whom the defenders are responsible That it was the duty of the defenders or of their goods manager or other servants, to have seen the chest of drawers securely stowed away until it was put upon the train; and the pursuer added, that it was no part of his duty to see the article stowed away, nor was he aware of its being there, or of its wanting a foot, or being insecurely placed.

The Lord Ordinary reported the case, adding in a note: - As regards the pursuer's employment—his being sub-' ject to the orders of Foulds, senior and junior—his being 'acting under their order at the time, the unsafe position of the chest of drawers, and the occurrence of the accident ' within the goods shed of the defenders, without any fault ' of his own, the pursuer's statements appear to be specific But beyond this they are vague and indefinite 'It is not said that the defenders are responsible for the 'Glasgow and South-Western Railway Company, who placed ' the chest of drawers where they were upon the platform 'The blame attributable to the defenders must consist, ' therefore, in leaving the article there. But although it is ' said it should have been stowed away, it is not said that it ' was the duty of any particular official, or person, or class ' of persons in the defenders' employment to have stowed it 'away, or who it was that failed in this duty, nor how long ' it had stood upon the platform, except that it had stood

'there for a "considerable time," nor that any person in HILL v. Calebonian Rail'the defenders' employment saw it standing there, or knew, way Co.
'any more than the pursuer did, that the article had a Liability for injury by careless placing of goods at a rail'In any view, the pursuer's statements seem to the Lord way station.
'Ordinary to afford no sufficient means.

'cause, for pronouncing any decision upon the defenders' ' plea, to the effect that they are not responsible for injury 'occasioned to the pursuer by the fault or negligence of a ' fellow-servant. The Lord Ordinary, before pronouncing 'any judgment upon a plea of that kind, would desire to 'know what was the relative position of this pursuer to 'the fellow-servant whose fault or negligence are said to ' have caused the injury, and more particularly, whether 'the so-called fellow-servant was or was not a person en-' trusted by the defenders with the duty of superintendence 'at the station, and whose orders the pursuer was bound to The Lord Ordinary has just decided a question of 'this description, so far as it arises on relevancy, in another ' case. (O'Brune v. Burn.) where he has referred to several ' of the authorities, but he does not consider that satisfac-'tory materials are afforded by the pursuer's statements ' for deciding that point here.

'As regards the pursuer's alternative statement, that the shaking of the platform was either occasioned by operations necessarily occurring at the station, "or by the violent and riotous conduct of certain carters or porters in the employment of the defenders," the Lord Ordinary greatly doubts whether in any view this can be held so stated as to found a separate and substantive issue, such as is proposed by the pursuer. But if the fault and negligence in leaving the lame-footed chest of drawers in an insecure position on the verge of the platform, from whence it fell upon the pursuer, be relevantly and specifically enough averred, they may probably be considered sufficient to enable the pursuer to bring his cause under a single issue.'

The Court adjusted the following issue:—'Whether the 'pursuer, while working in the employment of the defenders in the goods shed occupied by them at Paisley,

HILL v. CALE-' was on the 2d January 1852, knocked down and severely MAX CO.

Liability for injury by careless placing of ' injury, and damage of the pursuer.'

The jury returned a verdict for pursuer. damages £300.

The jury returned a verdict for pursuer, damages £300. The defenders moved for a new trial, on the ground of the verdict being contrary to evidence. The Court, on 3d March 1855, refused the motion. (D. B. M. 17, p. 569.) At advising,—

LORD PRESIDENT, (after going over the evidence)—The first question is. Does it appear that there was fault at all? On the first aspect of the matter. I should say that this is clearly a case where there was fault. I think that the placing of an article in the form of a chest of drawers or wardrobe, which had lost one of its legs, on the edge of the platform, was a wrong thing to do. There was as great a risk of its falling as of its not falling. It is said the defenders were entitled to put it there. I do not dispute that. But they were not entitled to put it in that position on the pretence of its being sound. It ought to have been placed in a secure position. A chest of drawers is not secure standing on three legs, instead of It might have been laid flat, or against a wall, which would have made it safe. Being placed on the edge of the platform, it is not safe. That is wrong, and it is a fault for which somebody is responsible. The question comes to be, Is the Company responsible for any injury following from that fault? In one point of view they are, unless it can be made out that the pursuer himself was the person who did it. The Company say that there was a person whose duty it was to look after these matters. It would be strange if there was not. Therefore, there being a proper person to attend to these matters, was a duty incumbent on the Company; and if that person was not there, and was absent by authority of the Company. that would make them responsible if they did not provide a proper superintendence. I am going on the supposition that the want of the leg was what no one observed. But farther, if the Company, as is their habit and arrangement, as I read the evidence, left to the hired servants of a neighbouring Company the duty of carrying in and placing it for them, and looked no more after it themselves, they made these people their servants, and it could hardly be expected that they would say they left it in a dangerous situation. Therefore the question comes to be, whether the fault be attributable to the party himself, yea or nay. Now he says-and in that he is confirmed—that on this occasion three out of five persons were In that state of matters, Hill, who had been previously a porter, but then placed on other duty, was asked and desired to do duty at the station. It rather appears that he was bound to do so if required, and he admitted that he was desired to do so. the question comes to be, Was he placed in the peculiar position of

doing the duty of Jack, and nothing else, or merely to make up the HILL v. CALEimperfect complement of people in the absence of three of them. DONIAN RAIL-Upon the presumptions and probabilities of the case, I think he was Liability for sent there to give help the best he could, not because Jack alone injury by carewas absent, but because three of the usual number of porters were less placing of absent. Faulds junior says that Hill was told to act as foreman way station. that day, but this evidence is not to be relied on. Alexander Faulds was in use to do this duty, and he was there that day, while the foreman was out of the way. He (the pursuer) might act, to a certain extent, in Jack's place, but that will not do unless it was put to him that he was to take the superintendence and charge. Suppose Hill had been appointed, it is proved that the drawers was brought in during his absence at meals; the fault was in the parties who had charge of it when Hill was absent. It was fairly a question for a jury to take into consideration, and I do not think this is a case in which we can disturb the verdict on the ground of being contrary to evi-His Lordship farther stated, that it did not appear to the Court that the verdict could be interfered with on the ground of excessive damages.

27th January 1855.—John Little, Pursuer, against The Merlee Iron Summerlee Iron and Coal Company, Defenders.—Whether mas-Jur. 27, p. 135, D. 17, p. 310.

LITTLE v. SUMter liable for injury to pursuer (not a servant) asked by man-

The pursuer was a miner, residing near Holytown, ager to assist While walking on the high road near Stevenston, he was in their work. requested by the manager of the defenders' works, to assist a number of other men, then employed in removing a large boiler of five tons weight from a depot at New Stevenston to Jerviston, intended for one of the defenders' steam en-He alleged, that while so employed, and when trying to move a wheel of one of the carts on which the boiler was placed, he laid hold of one of the spokes, but very little movement had been made, when in consequence of the great weight pressing upon the axle of the cart, it became twisted, the wheel fell in against the cart, and the cross-bar of the cart on which the boiler was resting fell down and injured That the carts were ill adapted for his left hand and arm. the purpose intended, either as to strength or otherwise. He pursued the defenders for damages.

The defenders pled preliminary, that they were under no liability to the pursuer, who was not in their service or

That the Company ought not to LITTLE v. Sum-employment at the time. MERILE IRON to the Company ought not to MERILE IRON to the Company ought not to MERILE IRON to be liable because their manager asked a looker-on to assist. Whether mas-It was a simple request, which it lay with the pursuer to ter liable for injury to pursuer comply with or not, just as he thought proper, and if he did (not a servant) asked by man-comply with it, he did so at his own risk, and that no releager to assist vant ground of action was libelled.

The Lord Ordinary reported the case, and the Court sustained the relevancy, and approved of the following Issue: 'Whether on or about the 6th day of March 1852, the ' pursuer, while doing work for the defenders at the request ' of their authorised manager, was hurt in his person, in 'consequence of defect or insufficiency in the carts or other ' implements used in said work, arising from the fault of the ' defenders, to the loss, injury, and damage of the pursuer.'

LORD JUSTICE CLERK.—I do not pretend to say what may or may not arise at the trial upon the state of the facts then disclosed: but the statement here is, that in the opinion of the defenders' manager more people were necessary, and the pursuer was asked to assist. How can we say the partners are not answerable? It may turn out that the manager made an improper request, but we cannot assume that.

GISTRATES AND Town-Coun-CIL OF FORFAR. Liability for injuries caused by improper obstruction on public streets.

DARGIE v. MA-10th March 1855.—WILLIAM DARGIE, Pursuer, against THE MAGISTRATES AND TOWN-COUNCIL OF FORFAR. Defenders.—D. 17, p. 730; Jur. 27, p. 311.

> The pursuer was walking along the ! Little Causeway.' one of the streets of the royal burgh of Forfar, late at night. when he fell over a large stone lying on the pavement, and injured his knee. He raised an action of damages against the defenders, as representing the community of the burgh, concluding for payment out of the burgh funds. He averred that the defenders were the conservators, and had the sole management, control and superintendence of the public streets, that for many years they had drawn a large revenue and expended large sums out of the common funds of the burgh, in lighting, repairing, and making the streets. and that the inhabitants relied on their performing these duties—that the footpath on the 'Little Causeway' was

made at the joint expense of the defenders and the proprie-Dargie v. Mamade at the joint expense of the defenders and the proprie-gastrates and tors of the houses, and the stone over which he had fallen, Town-Counand which was the property of the defenders, had been CILOF FORFAR. Liability for placed there by them, or by persons acting for them, and injuries caused that it had lain on the pavement for some years through obstruction on their culpable negligence; that though the night was dark. public streets. none of the lamps in the 'Little Causeway' were lighted. and that this was also attributable to the culpable negligence of the defenders, whose duty it was to have the street properly lighted.

The defenders pled, inter alia, 2d and 3d, That no relevant statement of misfeasance or neglect of duty on their part had been made by the pursuer, and that supposing the injury complained of could be traced to their negligence, the burgh funds could not be answerable for the consequences of their delinguency.

The Lord Ordinary ordered the pursuer, before answer. to lodge a draft of the issues he proposed for the trial of the cause.

The following issue was proposed:-

'Whether on or about the night of the 7th of March 1853, 'by the fault or negligence of the defenders, or of some ' person or persons for whom they are responsible, the pursuer, 'while passing along the south side of a street called the "Little Causeway," in the said burgh of Forfar, fell over a 'stone in the pavement of the said street, whereby he ' was severely injured, to his loss, injury, and damage?'

The Lord Ordinary then pronounced the following interlocutor :---

'Finds that the pursuer is entitled to an issue, framed in 'appropriate terms, to the effect that, at the time and place 'alleged by him, the streets of the burgh of Forfar were, 'through the failure of duty of the defenders, as represent-'ing the burgh, in an unfit and dangerous state for passen-' gers, and that the pursuer thereby sustained the injuries ' complained of, and to that extent repels the first and third ' pleas in law for the defenders, which have been stated as 'sufficient to exclude the action; and appoints the cause ' to be enrolled for further procedure.

OTE. The question involved in this case appears to the Lord who inary to be one of difficulty.

The action is directed against the Magistrates and Council of the Auts the o The action is directed against the Magistrates and Council of the Burgh, and irgh of Forfar, as representing the community of the Burgh, and cival irgh of Forfar, as representing the community of the Burgh, and seeks to recover reparation for an injury, alleged to have seeks to recover reparation for an injury, alleged to have increased to be a seeks to recover reparation for an injury, alleged to have increased to be a seeks to recover reparation in a seeks to recover rep villy, seeks to recover reparation for an injury, alleged to have been ustained by the pursuer, an inhabitant of Forfar, through the insufficient and decrease of the second of t eolel ustained by the pursuer, an inhabitant of Forfar, through the insufficient and dangerous condition of one of the streets of the Burgh on ficient and dangerous condition of one of the streets of the Burgh on ficient and dangerous condition of one of the streets of the Burgh on ficient and dangerous condition of one of the streets of the Burgh on ficient and dangerous condition of one of the streets of the Burgh on ficient and dangerous condition of one of the streets of the Burgh on ficient and dangerous condition of one of the streets of the Burgh on ficient and dangerous condition of one of the streets of the Burgh on ficient and dangerous condition of one of the streets of the Burgh on ficient and dangerous condition of one of the streets of the Burgh on the streets of the of th E condition of one of the surgest of the Burgh for It is thus an action against the Burgh for orgal the night libelled. It is thus an action against the Burgh for damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets. damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its streets, and the general damages arising from the unsafe state of its state of i Juestion raised is,—Whether a Royal Burgh is liable in such a claim?

The question appears to the Lord Ordinary to turn mainly on the Power Royal Burgh of Careers to the power whether a Royal Burgh of Careers to the point whether a Royal Burgh of Careers to the point whether a Royal Burgh of Careers to the point whether a Royal Burgh is liable in such a claim? .In The question appears to the Lord Urdinary to turn mainly on the point, to be a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, to be it at a tractain a set of the point, and the point and t .ib-E , ie: obligation to keep its streets in a safe and sufficient state. If such the failure to an obligation is by law imposed on the corporation, the failure of the the point, whether a known burgh, as a Corporation, is to obligation to keep its atreets in a safe and sufficient state. لظن an obligation is by law imposed on the corporation, the failure to fulfil it seems to give rise to a claim against the corporation, at the interest of injured nortice for the corporation of that failure tuing it seems to give rise to a claim against the corporation, at the instance of injured parties, for the consequences of that failure. he instance of injured parties, for the cousequences of that failure.

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'Some duties are by law or statute imposed on the incumbent on the cousequences of the failure. Some duties are by law or statute imposed on the Magistrates or the incumbent on the incumbent on the incumbent of a Burgh, which are not liable for amplitude incumbent on the incumbent of the incumbent of the incumbent of the incumbent of the incumbent on the incumbent of the incumbent incumbent of the incumbent of the incumbent of the incumbent incumbent of the incumbent of the incumbent of the incumbent incumbent incumbent of the incumbent of the incumbent Jurisdiction and Magistracy are not proper duties Mor. 2504-5.

'Mor. 2504-5.

'Of the Burgh.

'Bailies, virtute officii indeed, but independently of the Royal of the community of the special of the community of the special of the Royal official indeed, but independently of the Royal of t Bailies, virtute officii indeed, but independently of the community of the * at large, and in which, accordingly, the Councillors of the may be have no right to participate or interfere. Again, duties special have no right to Magistrates and Council of a Burgh by special imposed on the Magistrates and Council of a council of a council had a council of a council had a c imposed on the Magistrates and Council of a Burgh by special Commissioners as a selected body of statutory delegates or Ruman in that · Mor. 2504-5. statute, as a selected body of statutory delegates or Commissioners in that the Burgh in that of a public purpose, but not as representing the root will not involve for a public purpose, feilure of duty on their next will not involve their next will not involve. for a public purpose, but not as representing the rough in that involve of duty on their part will not involve matter, and so that a failure of duty on their part will rive in the consequences thereo origins matter, and so that a failure of duty on their part will not involve the raising.
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'strates and Town Council of Rolls Annual & Roll strates and Town Council of Edinburgh, 25th May 1845. [Dun-land of Edinburgh, 25th May 1845]. [Stentman of this duty (the amointment of Stentman of this duty).] · lop, 663, affirmed on Appeal 6. Bells, App. 509, where it was found . Stentmas-that the performance of this duty, (the appointment of Stentmas and Council as a holy of that the performance on the Magistrates and Council as a holy of the top was imposed on the Magistrates and Council as a holy of the found of the Magistrates and Council as a holy of the found of the Magistrates and Council as a holy of the found of the Magistrates and Council as a holy of the found of the Magistrates and Council as a holy of the found that the performance of this duty, (the appointment of stentings as a body of ters,) was imposed on the Magistrates and Rumb itself them. ters,) was imposed on the Magistrates and Council as a through the Burgh itself through statutory commissioners, and not upon the Burgh itself the magistrates and administrators and that the magistratory commissioners and administrators and the statutory commissioners and administrators and the statutory commissioners. statutory commissioners, and not upon the Burgh Itself the prothem as its representatives and administrators, and to liability for each them as its representatives and administrators, and that the pro-· perty of the corporation could not be subjected to liability for as done by them when not acting in their proper official capacity.

· done by them when hand there are duties which come indeed to one by them when not acting in their proper ometal capacity. be
'On the other hand, there are Administrators of a Rurch as the On the other hand, there are duties which come indeed to be a service of the community but which are marked to the community but which are marked duties of the community but which are marked duties are duties which come indeed to be a service of the community but which are marked duties are duties which come indeed to be a service of the community but which are marked duties which come indeed to be a service of the community but which are marked duties which come indeed to be a service of the community but which are marked duties which come indeed to be a service of the community but which are marked duties which can be a service of the community but which are marked duties are duties and duties which can be a service of the community but which are marked duties are duties and duties are duties and duties are duties are duties and duties are duties are duties and duties are duties are duties are duties are duties are duties and duties are exercised by the Magnetrates or Administrators of a Burgh as the original of the community, but which are proper duties, or is a share it and for which it has been is a street and for which it has been is a street and for which it has been is a street and for which it has been in a street and for which it has been in a street and for which it has been in a street and for which it has been in a street and for which it has been in a street and for which it has been in a street and gations, on the Burgh itself, and for which it has been held have the Burgh is liable in damages to the injured party when the bind have the Burgh is liable in damages to the injured party when the bind have the book among a reformed to the book are the book among a reformed to the book are th A well known example of this kind ont been properly performed. A well known example of this escape is to be found in the cases formerly so numerous, as to the escape is to be found in the cases formerly that the Rurah itself was under the property where on the ground that the Rurah itself was under the property where on the ground that the Rurah itself was under the property where on the ground that the Rurah itself was under the property performed. is to be found in the cases tormerly so numerous, as to the escape of prisoners, where, on the ground that the Burgh itself was under the prisoners, where, on the ground that the prisoners of Associated the ground that the gro · of prisoners, where, on the ground that the Burgh Risel was under of prisons, actions of damage not been properly performed.

V.

were sustained against the corporation at the instance of Creditors Dargie v. Mawhose debtors had not been duly detained in custody.

'The question in the present instance seems to be,—Whether the CILOT FORFAR.
'duty or obligation of maintaining the streets of a burgh belongs to Liability for the one or other of these two classes. It is clear that there is a muni-injuries caused by improper cipal duty somewhere, either on the burgh or on its administrators obstruction on only, to have the public streets in proper order. If that duty lies public streets solely on the magistrates or administrators, like the conservation of the peace or the levy of the Annuity Tax, the present action is untenable. If it lies on the burgh, and its administrators, as the organs of the burgh, like the maintainance of prisons before the New Prison Act, the present action seems to be competent.

In the case of Banff, already referred to, M. 2505, Kilkerran ' observes, that the only case in which a community is liable for the 'delict of their magistrates, is that of their suffering a prisoner to 'escape, which is founded upon this reason, that the burgh is by 'law bound to have sufficient prisons, and consequently is answer-'able for the keepers thereof. This dictum may be so far an auth-' ority, excluding the present ground of action, but subsequent cases point to a different view. In the case of Threshie, (The Dumfries 'Road Trustees,) against the Magistrates of Annan, 11th December '1845. 8 Dun. 276, it was held, that the magistrates and town-'council of the burgh were bound to maintain the street in repair 'out of the common funds of the burgh. The decision of the Lord 'Ordinary in that case, adhered to by the Court, found that the 'defenders, the Magistrates and Town Council of the Royal Burgh ' of Annan, are bound to keep and maintain in repair the High Street ' of the said royal burgh, out of the common funds belonging thereto. 'In that view, the duty of maintaining the streets comes to be as-'similated to the other duty of having sufficient prisons, and it is 'difficult to say, that the same consequences should not flow from 'a breach of duty in the two cases.

'The decision in Innes against the Magistrates of Edinburgh, '9th February 1798, seems to have proceeded on this principle. The authority of that case is weakened by the anomalous form of the 'action, if, as would rather appear, it was directed only against the magistrates, and doubts have since been thrown out as to its soundness. But it has not been overruled or condemned by any subsequent authority, and in Lord Medwyn's opinion, in the case of the 'ministers and magistrates of Edinburgh, it is treated as having 'added since the time of Kilkerran, another example of liability of 'corporation funds for the neglect of magistrates, and this on the 'ground that the magistrates are bound out of the common good to 'keep the streets of a burgh safe for the use of the community, and 'consequently, that the corporation funds should be made responsible for a neglect to make the requisite expenditure out of them 'for this purpose.

'It may appear a singular result, that the community and its funds should thus be liable for the unsafe state of the public streets,

when a corresponding liability would not exist if the streets were

DARGIE v. Ma-' under the management of a public commission. But the answer GISTRATES AND to this difficulty seems to be, that there is an essential difference Town-Counto this difficulty state and a corporation. A trust is not a person in the CLIOFFORFAR. between a trust and a corporation. A trust is not a person in the CLIOFFORFAR. It is created for certain purposes, but the duties injuries caused imposed under it are laid on the trustees, and for any failure of by improper imposed under it are laid on the trustees, and for any latter of obstruction on duty, the wrongdoers alone can be responsible. A corporation is public streets a legal person. It cannot, it is true, commit crimes or proper 'delicts; but it can undertake corporate duties, it may fail to dis-'charge them, and the failure may be visited civilly on the party ' failing, that is, on the corporation which undertook the duty, and 'which did not discharge it. If it could be maintained as an abso-' lute rule, that a corporation could not undertake duties, the case 'would be different; but this extreme view seems untenable, and ' the case of actions of damages for escape through the insufficiency of prisons, seems conclusively to show at once, that there may be 'a corporate duty, and that damages may be recovered from the 'corporation for its non-performance.

> 'In the law of England, from which the principles applicable to 'public trusts under this head seem in a great measure to have been 'brought or revived, it does not seem impossible to hold that a cor-' poration may have duties, and may be liable in damages for a failure 'to discharge them. The Mayor of Lynn v. Turner, 1 Cowper's 'Reports, 86; Henley v. the Mayor and Burgesses of Lyme-Regis.

' 3 Moore and Pavne, 278.

'On the whole, therefore, the Lord Ordinary considers that the ' preponderance, both of principle and of authority, is in favour of

' sustaining the present action.

'It is objected that the pursuer himself is a member of the com-'munity which he is seeking to subject. But this seems no bar to 'the action. It is presumed that an inhabitant, or even a burgess of a burgh, could have maintained an action of damages against the burgh for the escape of his debtor from the burgh prison. ' pursuer is one of the lieges for whose benefit the duty of maintain-'ing the streets is imposed, and he cannot, it is thought, be exclud-'ed from reparation of the injury, suffered by himself individually. ' because he lives in the burgh where the duty has been neglected.

'The Lord Ordinary feels that the statements in the pursuer's 'record are not framed throughout with all the logical precision ' which would have been desirable in reference to the nice principles 'on which the action depends; and he sees that much may be said on the question of fact, and under the circumstances of the case, to 'diminish or reduce to nothing the pursuer's cause of complaint. But he does not think that he would be justified in throwing out the action on such grounds.'

The defenders reclaimed, and argued,—The Magistrates were not called for their separate interests, but as representing the corporation. In this capacity they were accused of two wrongous acts, or failure of duty,—the placing of the

stone and the imperfect lighting of the street. As to the DARGIE v. MAfirst of these, the averments of the pursuer were defective. Town-Coun-There was nothing to shew that the community, acting as CILOF FORFAR. they only could act, not through the Magistrates alone, but juries caused by through the Magistrates and Town Council, in council struction on the assembled, had placed the stone there (Ersk. 1, 4, 22). There public streets. was no averment that there was any authority given by the Magistrates and Town Council to do the act complained of. This averment was essential, for the alleged act, by ex hypothesi, wrongous, it could not be held that any of the Magistrates had an implied authority to do it. Were the streets in reality the property of the burgh? If so, there might be ground of action. In the case of jails, an Act (1597, c. 217) was required to make Magistrates liable for their building and repair. The streets, however, were not the property of the Magistrates or community. They were inter regalia (Bell's Prin.; see 660. Ersk. 2. 6. 17. Millar. M. 13, 527). No analogy, therefore, could be drawn from the obligations of proprietors; but it was said that the Magistrates and community were conservators of the streets. In matters of police, the Magistrates and Council did not represent the corporation, but the public interest. power was not delegated by the community, but by the Sovereign, and was created by law to effect certain objects. not for the advantage of the community of the burgh alone. but of all the lieges. The case of the Magistrates of Banff was a stronger case than the present. The pursuer referred to the case of Threshie. 11th December 1845; but it only went to show that the funds of a burgh ought to be used for the repair of the streets, which was not denied, but it did not follow that the community was answerable if the Magistrates neglected to use their funds for that purpose. (Lord Ivory—Who, then, is liable?) Practically, the Magistrates; but this action is not directed against them individually, but against the community.

LORD PRESIDENT.—We have here two pleas to be disposed of. The question appears to me to come back to the case of Innes v. The Magistrates of Edinburgh. That case exists only in fragments, and they contain little that can affect our decision. I am therefore inclined to adhere; but the facts alleged here are much more slender than in the other case, and at the trial a very small falling short of

LORD IVORY.—I concur. In the case of the Ministers of Edin-

Dargie v. Ma- the averments would take the case out of the category of neglect of GISTRATES AND duty on the part of the Magistrates.

Liability for in-burgh v. The Magistrates, I had occasion to make some observations

juries caused by on a similar question, especially as to the line where responsibility improper obstruction on the begins and ends. The line is subtle, but I cannot, in the present public streets. case, draw it more closely than I did then. Neither in it, nor in the case of Innes, is there much upon which we can shape an authority for subsequent decisions; but the general principle of these cases is not excluded here. The case of Threshie throws more light on the question. It determined the liability of the community. and the parties who acted under their authority, to perform certain From this to the case of *Innes* there is but a step: and in all the subsequent cases, in which the case is referred to, there is nothing to shew that it is not still a standing authority. In Duncan v. Findlater the case is laid upon statute, and the real question was. whether the trustees were within or without their duty. As to the second point, I cannot help thinking that if all the dates and details had been very candidly stated, there would have been little of a case.

LORD CURRICHILL.—I concur with the Lord Ordinary, in holding that the first and third Pleas in Law for the defenders are not sufficient to exclude the action.

The first defence is, that the pursuer has not made a relevant statement of misfeasance or neglect of duty. The pursuer states, in the record, that the defenders are the conservators, managers, and superintendents of the public streets of the burgh, and have annually expended large sums in forming, improving, maintaining, repairing, and lighting these streets: and one of these streets is known by the name of the 'Little Causeway,' the south footpath of which was recently paved or repaired, partly at the expense of the magistrates. and partly of the proprietors; that this footpath is part of the public street under the charge of the defenders, as above mentioned; that on that footpath a large stone, about five feet long, and fourteen inches square, was placed, whereby more than two-fifths of that footpath was obstructed; that the defenders are the parties to whom the stone belongs, and who placed it in this dangerous position: and that this obstruction, on a dark night in the month of March 1853, caused a severe personal injury to the pursuer, for which he now demands redress. He expressly avers that the obstruction was improper and dangerous, and that the defenders not only failed in their duty in allowing it to remain in the public street, but were themselves the party who placed it there. Assuming the truth of these statements, I think they are relevant. Even if it were not the duty of the defenders to keep the public streets of the burgh free from dangerous obstructions, yet if they themselves were the party who actually placed such a dangerous obstruction thereon. (as is alleged in the 6th article of the condescendence.) I think that such a 'misfeasance' would be a relevant ground of action.

But the more important question is, Whether the corporation of a royal burgh is under a legal obligation to keep the public streets of the burgh free from dangerous obstructions? If this were a new Dargie v. Maquestion, it might require much research and consideration; but I GISTRATES AND TOWN-COUNTINES. The Magistrates of CILOF FORFAR. Edinburgh, that such an obligation is incumbent upon the corpora-Liability for intion. The report states that the Court were unanimous in thinking juries caused by the action well-founded against the magistrates. One of their most struction on the important duties (it was observed) is to take care that the streets of public streets. the city are kept in such a state as to prevent the slightest danger

to passengers. They are liable for the smallest neglect of this duty? The party against whom the decree for damages was pronounced in that action, was the Corporation of the City of Edinburgh. Doubts which were suggested as to this have been obviated by an examination of the process itself, from which it appears that although the individuals who had been in the Magistracy when the accident happened, as well as the Corporation, were called as defenders, the action was not insisted on against these individuals, and the Corporation itself was the only party against whom the decree was pronounced. This appears from the terms of the decree itself. and also from an express statement to that effect in a second reclaiming petition which was lodged for the Magistrates, as representing the Corporation, after the decree in favour of the pursuer Innes was final, by there having been two consecutive judgments of the Inner House against them in his favour. The object of that petition was merely to endeavour to establish a claim of relief in favour of the Corporation against any surplus funds which might eventually be left in the hands of the trustees for the College; and it is there distinctly stated that the Corporation funds were primarily liable, in virtue of the final decree, to Innes.

In the case of *Threshie*, 11th December 1845, it was again expressly found that the Corporation are bound to keep and maintain in repair the streets of a royal burgh out of the common funds belonging thereto.

Holding that the obligation to keep the streets of the burgh free from dangerous obstructions is incumbent on the Corporation, I further think that the plea, that the funds of the Corporation are not answerable for the consequences of a breach of that duty, or of failure to perform it, (being the third plea maintained for the defenders,) is not well founded. That plea is directly at variance with the judgment in the case of Innes. Nor do I think that the principle recognised in that case is at variance with any subsequent authority. The cases in which it has been held that funds raised by taxation for specific purposes—such as the making and the repairing of public roads—cannot be applied in relieving the administrators of the funds, or contractors with them, from the consequences of their misconduct or negligence, appear to me to depend upon different principles; and I do not see that, in the decision of these cases, the principle of the case of Innes was called in question. In the case of royal burghs the Corporation itself is the obligant, although, like all other Corporations, it must conduct its business through its office-bearers. And if it contravene its obligations, or

DARGIE v. MA-fail in performing them, the Corporation, like any other obligant. GISTRATES AND must be liable to make good the consequences out of its general

CHOF FORFAR funds. And accordingly, it has been repeatedly decided that the Liability for in-common good of a royal burgh was liable in payment of the damages juries caused by incurred to a creditor in consequence of his debtor having been struction on the allowed to escape from prison, or having been too much indulged public streets. While detained there. And it is a mistake to say that in cases of that class, the obligation to make such indemnification out of the common good, was enforced by statute. If the mere circumstance of the obligation being statutory were of any relevancy, it would operate the other way; because in the cases regarding road trustees and others, above referred to, the trusts were created by statute. But although an obligation to erect and maintain jails was imposed by statute on the Corporation of every royal burgh, the statute is silent as to the party who was to indemnify those who might suffer from a failure to perform that obligation; and the Corporation, on the same principle on which it is liable for a breach of the duties imposed on it by statute, must be liable for a breach of duties arising from its very constitution.

Whether the Corporation may have relief against any of its officebearers, to whose fault or negligence the breach of its obligation may be attributable, is a different question. But the Corporation itself being in the position of an obligant, it is the party who must, in the first instance, make good the funds, both for fulfilling its obligations, and for indemnifying those who may suffer by the breach While I think that the Lord Ordinary's interlocutor is right, in holding that the first and third defences are not sufficient to exclude the action, I think it requires further consideration whether the issue should be in the precise terms, or to the precise effect set forth in the interlocutor. In particular, if the pursuer intends to insist on what is called the misfeasance alleged in the 6th article of the condescendence, the issue is, perhaps, not expressed so as to bring out that question. But this is a matter of subordinate importance.

The Court adhered.

The case subsequently went to trial, and the jury returned a verdict for the pursuer, damages £400.

GREENHORN v. 13th June 1855.—ALEXANDER and JAMES GREENHORD ADDIE AND Pursuers, against Addie & Millar, Defenders.—13 MILLAR. Collateral rela-June 1855.—17 D., p. 860. tives not eutitled to recover

reparation for This was an action of assythment or damages at the injuries to deceased relative stance of the brothers of a person, who was alleged to have been killed while a miner in the employment of the fenders. It was alleged that he was killed by the fal 2ϵ Į

a stone from the roof of the pit, which was insufficiently GREENHORN v. The action was founded as follows:—'That by ADDIE AND MILLARD supported. supported. The action was founded as follows:—'That by MILLAR.' the death of the said John Greenhorn, the pursuers have Collateral relatives not enbeen deprived of the society and sympathy of a kind titled to recover brother, and they have also suffered deeply in their feel injuries to de-'ings and interest; and for the loss, injury, and damage ceased relative. 'so sustained by them, the defenders are bound to make

The defenders pled that the pursuers had no title to sue such an action, and the Lord Ordinary reported the case, explaining at length the authorities on the point. Court sustained the objection, and dismissed the action.

' suitable reparation.'

LCRD PRESIDENT.—Although I am not prepared to give any judgment in reference to a case which may have other elements in it-I mean elements of criminality in the origin of the death, or of pecuniary loss, direct or mixed, or other elements of that kind-yet with regard to the case which now presents itself, I do not think that we have any principle or precedent for sustaining the title of the collateral pursuers.

LORD IVORY.—It seems to me that this is a claim for civil reparation; and being so, it is in its whole nature distinguishable from assyth-As such, it must be supported as a claim for individual wrong. There is none here, and therefore I am of opinion that the action here is not supported, and cannot be supported, unless we extend the principle that the next of kin, however remote, shall enjoy the privilege of bringing such actions.

4th July 1855.—ALEXANDER DAVIDSON, Pursuer, against DAVIDSON v. THE MONKLAND RAILWAY Co., Defenders.—17 D., 1038, MONKLAND Co. 27 Jur. p. 541.

Liability of Railway Co. as to fences—fault

The pursuer's child, aged between two and three years, on pursuer. was found drowned in the Forth and Clyde Canal, at a short distance from the mouth of a lade or water course which forms a feeder to the canal. The banks of the lade are the property of the defenders, the Monkland Railway Co., whose line runs alongside of the lade, and the pursuer's house, which he held under the tenant of the Railway Company, is on the opposite side of the line.

Neither the Railway nor the lade are fenced at the spot.

DAVIDSON v. MONKLAND to fences-fault in pursuer.

The pursuer sued the Railway Company and the Canal RAILWAY Co. Company for damages for the loss of his child, the locality Liability of Railway Co. as being left in an unfenced and dangerous state.

The defenders maintained that they were not responsible. in respect that it was not a place which they were bound to protect with a fence, and that the culpa of the child's death rested on the pursuer in permitting so young a child to wander unprotected.

After taking evidence, the Sheriff (Alison,) pronounced the following interlocutor:-

Glasgow, 15th December 1853.—'Having resumed con-' sideration of the case, and heard parties procurators upon ' the pursuer's appeal, and thereafter reviewed the proof and ' whole process. Finds, that the feeder of the canal, as ori-'ginally constructed by the Canal Company upon their own ground, was attended with no danger at all to the neigh-'bourhood, even so far as young children were concerned, ' seeing it had shelving banks, and was very shallow, not 'exceeding from eight inches to a foot in depth, so that 'there was no danger of life attending it; Finds, that it ' became dangerous for the first time when the Monkland ' Railway Company took possession of the site of the feeder of the canal, in virtue of the powers contained in their 'Act, and proceeded to erect on the course of the stream, ' close to the edge of the water, a variety of constructions 'which entirely altered its character, and rendered it very ' hazardous to the neighbourhood: Finds, that these con-'structions consisted chiefly in running an embankment of ' considerable height along the whole course of the stream ' with a front to it, everywhere steep, and at some places ' perpendicular, which being carried out into the stream had ' the effect of rendering it deeper and more rapid, and very 'dangerous to persons living in the vicinity: Finds it ' proved, that in consequence of the alterations upon the 'course of the stream, several children have fallen into it, ' one of whom, besides the pursuer's child in question, was ' drowned, and the Railway Company's engineer fell into it ' himself and was with difficulty got out: Finds it proved, ' that in rainy weather there is a considerable flow of water 'down this feeder into the canal, which is about twenty

' yards beneath it, sufficient in such swollen state to sweep DAVIDSON v. down a child falling into it to the canal: Finds, that the RAILWAY CO. Railway Company were aware of the danger of this locality, Railway Co. as and on that account had made it a rule to have, as their direct fences—fault in pursuer. ' tenants of the houses they had built in the neighbourhood. ' persons only without children, but that not with standing this. 'they took no steps to fence off the Railway to prevent danger 'to persons falling into the stream: Finds, that the house ' in which the pursuer lived is close upon the Railway, on ' the other side of the feeder of the canal, and that he came 'there as a sub-tenant with several children, but neither of 'the defenders took any steps to prevent danger to the 'children from the close proximity of the feeder to the pre-'cipitous banks: Finds it proved, that on the occasion in ' question, the pursuer's child, who was about three years of ' age, and to whom its parents were very attentive, wandered 'out of the house in the forenoon with a hammer in its ' hand, and was not seen again till it was found drowned in 'the canal below its junction with the feeder: Finds it ' proved that the child's hammer was found in the lade or ' feeder to the canal, at a little distance from the pursuer's 'house, and that a splash was heard, and a cry got up 'among some children in the neighbourhood, that the child ' was being carried or swept down the lade: Finds it proved, ' from these circumstances, joined to the finding of the child's 'body drowned in the canal, that it had fallen into the ' feeder at the place where the hammer was found, and was 'swept down the stream into the canal: Finds it proved, ' that there were persons on the Railway, between the pur-' suer's house and the canal, at the time of the accident, who ' did not see the child going to the canal, which they must ' have done had it made its way down to the canal that way: · Finds, that the pursuer was a working miner inhabiting a 'house low rented, and was earning wages at the rate of 'thirteen or fourteen shillings a-week, and that he was wholly unable to pay for a person to look after his infant children, and prevent them straying from the house: Finds, in point of law, that any party who has made an excavation or erected a structure, or made an alteration on the natural surface of the ground, of such a kind as to be

MONKLAND Liability of Railway Co. as in pursuer.

DAVIDSON v. 'attended with danger to the lieges, is bound to take all MONKLAND RAILWAY Co. ' reasonable precautions against the danger thence arising. as ' by fencing in a coal-pit, or fencing a dangerous precipice. tofences—fault' or the like, to prevent the danger arising from the arti-'ficial change made on the natural state of the ground: 'Finds, that this does not apply to danger arising from 'natural causes, such as from precipices or running streams ' and the like, as to which every party is bound to take care ' of himself or his children, or those dependent upon him: ' Finds, that the Railway Company, having built the houses 'in the close vicinity of the Railway and feeder, and drew 'the rents, and derived the profits thereof, were in an 'especial manner bound to guard against the danger to the 'inmates of these houses, from the alterations they had ' made for their own profit and advantage on the previous ' undangerous state of the feeder to the canal and its banks: 'Finds, that having neglected to fence it in any way, they ' are liable in damages to the pursuer on account of the loss ' of his child: Finds, that the only culpa that can be at-' tributed to the pursuer to diminish or take away his claim ' for damages, is that of having come with his eyes open into 'a dangerous locality, but finds that in law it is not suffi-' cient to take away his claim for damages, seeing the dan-'ger was of human creation, not the work of nature, and ' that he was entitled to rely upon the parties who created ' the danger implementing their legal obligation to take all ' reasonable means to avert it: Finds, so far as concerns the 'Canal Company, the other defenders in the action, that 'their fault consisted only in not having steps taken to 'compel the Railway Company, after they had created the 'danger, to lessen or avert it: Finds, however, that this is ' not sufficient to subject the Canal Company in damages for 'the loss of the child: Therefore, alters the interlocutor --'complained of Decerns against the defenders the Monk-' land Railway Company, for £50 sterling of damages, for ' the loss of the child in question, with interest from the 'date of citation; and finds them liable in the expenses to ' the pursuer, of which appoints an account to be given in ' and taxed by the auditor: Assoilzies the Canal Company, ' the other defenders, from the conclusions of the action as

- ' against them, but in respect of their not having taken any DAVIDSON v. steps either to guard against the danger arising from their RAILWAY Co.
- ' feeder itself, or to compel the Railway Company to do Liability of Railway Co. as to fences—fault

' that, finds no expenses due to them, and decerns.

The Railway Company advocated, at advising

in pursuer.

LORD PRESIDENT.—The case is now entirely between the pursuer and the railway company—the canal company not being parties to the advocation. I have read the proof attentively, and I have not come to the same conclusion as the Sheriff. I do not think that the pursuer has established his case. There is no doubt that the child was drowned in the lade, and not in the canal. That lade belonged to the canal company. It has not been established that there is a public footpath along its margin between it and the railway. There was, therefore, no occasion for anybody to be at the place where this child was drowned. No doubt the place was unfenced, but things were in the same condition when the pursuer came and entered on possession of his house there. The state of matters is not such as to be dangerous to adults. Nor is it alleged to be so; while, on the other hand, the danger to young children is so palpable as to impose an obligation upon parents to pay particular attention to them when they have access to such a place. This child was allowed to wander unprotected. There was here no culpa, except on the part of the parents themselves. The railway itself was dangerous to children Indeed, it is difficult to say what is not danif unattended. gerous to a child of these tender years if left to its own guidance.

The other judges concurred.

The Court pronounced the following interlocutor:—

- "Remit to the Sheriff with instructions to recal the inter-
- ' locutors complained of, so far as they apply to the advo-
- ' cators, the Monkland Railway Company; to assoilzie that
- ' company from the conclusions of the summons in the said
- action, and to find them entitled to expenses and decern.
- ' Find the advocators also entitled to expenses in this Court

' and remit." &c.

3rd July 1855-1858.—ELIZABETH CLARK or REID, and dent—Non-others, Pursuers, against THE BARTONSHILL COAL Co., liability of employer for inin-Defenders.—D. 17, p. 1017. Jur., vol. 27, p. 518, and ries to a work-3. M'Queen, 206.

The action was for damages at the instance of the widow man at the same dehildren of William Reid a minor of the widow man at the same dehildren of William Reid a minor of the widow man at the same dehildren of William Reid a minor of the widow man at the same dehildren of William Reid a minor of the widow man at the same dehildren of William Reid a minor of the widow man at the same dehildren of William Reid a minor of the widow man at the same dehildren of the w

and children of William Reid, a miner, who was killed in ployment.

CLARK OF REID, &c., v. The Bartons-HILL Co.

CLARK OF REID, ascending a coal-pit belonging to the defenders, and whose THE BARTONS-HILL COAL Co. death, it was alleged, was caused by the fault or negligence Coal-pit acci-dent—Non- of the defenders, or of those for whom they were responliability of em-sible. The facts appeared to be that Reid was killed by ployer for injuries to a work-the overturning of a bucket, or cage, in which he and anman caused by other workman were being drawn up from the pit by means negligence of a of a stationary engine at the pit-mouth; that Shearer, who man at the same was employed by the defenders, had charge of the engine, common emand had allowed the cage to be drawn up considerably higher ployment. than it ought to have been, and the result was that the cage was overturned, and the men thrown out and killed, It was proved that Shearer was generally held a trustworthy man, and of good character.

> The LORD PRESIDENT directed the jury that if they were satisfied that the injury was caused by the culpable negligence and fault on the part of Shearer in the management of the machinery, the defenders were in law answerable.—The Defenders excepted to this direction, and desired his Lordship in point of law to direct the jury that if they were satisfied that the defenders used due and reasonable diligence and care in the selection and appointment of Shearer as engineman, and furnished him with proper machinery and all necessary means for the performance of these duties, then the defenders were not in law answerable for the personal fault or negligence of Shearer in the management of the machinery. The judge declined to give this charge, and the jury returned a verdict for the pursuers. A Bill of Exceptions came before the Court—the defenders contended that there was no special contract or warranty of safety to the workmen, and here there was no blame on account of deficient machinery, and both parties assumed that Shearer was an unexceptionable person in general character and qualifications for the duty of engineman. As regarded two men, both in a common employment, they were pari passu, and bound both to protect each other, and to take care of themselves. A servant was the same in this respect as a piece of machinery, and if the master had taken due care in his selection, he is no more liable for a latent flaw in his character than for a latent flaw in a piece of iron. How far was the principle contended for by the pursuers to be carried? Was the master to be liable for a sudden fit of nervousness, such as might accrue to the best and coolest workman? By common employment, all that was meant was that they were all engaged at one place and time working for one common object as was the case here. An accident or neglect on the part of the workmen was just one of the risks which the men undertook in entering on the employment. The pursuers argued that even were the law to be as contended for by the defenders in regard to common employment, the present was not a case of common employment in the sense required. The one man worked



in the pit as a common collier, while the other had the charge of CLARK OF REID an engine for raising the coals and the men to the surface.

The Lord President said,—As to the general question of respon-HILL COAL Co. sibility for the fault of a servant who injures his fellow-servant, I Coal-pit accisibility for the fault of a servant who injures his fellow-servant, dent—Non-have little to say apart from what was said in the case, *Gray* v. *Brassy* dent—Non-liability of em-It does not seem to me, however, that Shearer and the men who player for injuwere injured were in any sense "fellow-servants." As to the quali-ries to a workfications of Shearer, there can be no doubt that he was in this man caused by instance culpable, and that fact must affect the estimate of his gene-negligence of a ral character. He was performing a duty which the defenders owed fellow-workto their workmen, and they are responsible for him as the party common emsent by them, and who represents them in this matter.

LORD IVORY.—I am satisfied that the position of Shearer does not come up to that of colaborateur. He had superintendence to some extent. and sufficiently to make him a representative of his employers, and to separate him from the other workmen. We are told that his appointment was the mere selection of a human machine. That illustration, if good for anything, would carry us the length of denving the liability of the employers, even to such strangers as

might be hurt by the culpa of the servant.

LORD CURRICHILL concurred.—Shearer was employed as engineman to raise the men from the pit. That was his peculiar duty, and the men who were killed had nothing to do with that duty. characters in which they acted were quite distinct. The workmen in doing their duty, were working for their employers. In the other case, the master is working for them. These are reciprocal The question, therefore, which has been so duties and obligations. much discussed in England, has no room here, and is not open to us.

LORD DEAS.—The reasoning by which it is attempted to be made out that the master is not liable, is this-It is said if the master. exercising all reasonable care, provides machinery which is to all appearance perfect, he is not liable for latent defects, such as the imperfect welding of an axle in such machinery; and, in like manner, it is argued he is not liable for his servant, selected with all due care, as properly qualified, and who is likened to a sort of human machine. But the argument goes too far; for in the case supposed the master is not liable even to third parties any more than he is to his servants for injuries received from latent defects in the And it would follow from the argument that if due care was exercised in selecting a coachman or farm servant, the master would not be liable, although the coachman, or servant, should culpably drive over and kill the child of a third party—the reverse of which has been repeatedly decided. There is, therefore, a difference in liability for men and machinery. Moreover, there are admittedly cases in which a master is liable even to his servant for the fault or negligence of another of his servants of which O'Bryne v. Burn (8th July 1854) is an instance. There, no doubt, the girl injured was subject to the orders of the overseer, whereas the colliers here were not under the orders of the engineman; but I think the two cases fall under the same category. I do not say that there may

ployment.

CLARK or REID, not be a case of common employment in which one servant shall be dc., v. held to take the risk of the fault or negligence of a fellow-servant.

HILL COAL Co. No such case has yet occurred for decision in Scotland, and I wish Coal-pit acti- to give no opinion on it till it occurs. But such is not the nature dent—Non- of this case, in which it was the duty of the master to convey the ployer for inju-miners safely up and down the pits without subjecting them to ries to a work-injury from fault or negligence, and if he delegated this duty to anman caused by other as his representative, he became equally liable for the fault the fault or negligence of a and negligence of that representative as for his own. fellow-work-

Exception disallowed.

man at the same common employment

The defenders appealed to the House of Lords, and, after argument, the case was delayed for consideration, in consequence of the general importance of the question involved, as affecting the laws of England and Scotland. advising on 17th June 1858,

The LORD CHANCELLOR said: 'This was an appeal against four 'interlocutors of the Court of Session, made in an action raised by ' the respondents against the appellants, whereby they sought to ' recover from them compensation in damages for the loss they had ' sustained by the death of William Reid, the husband of the respon-'dent, Elizabeth Clark or Reid, and the father of the other respon-' dents.

'The facts stated by the respondents, Elizabeth Clark or Reid, ' and her children, as the grounds of their claim, were as follows :-'That in, and previously to, the month of September 1853, the appel-' lants were owners of, and were engaged in working a coal-pit called 'the Dykehead pit, and that William Reid was a miner, in their ' service: That, according to the usual course of working the coals ' in this pit, the miners were let down into, and drawn up from the 'pit, in a cage, which was worked by a long rope running over 'a pulley, fixed by machinery at a considerable height above the 'mouth of the pit, and worked by a stationary steam-engine, fixed 'at a few yards distant from the pit: That, on the 17th September ' 1853, James Shearer was the engine-man, employed by the appel-' lants to attend to this engine, and that it was his duty to attend to ' the drawing up and letting down of the cage, so that the workmen ' might be moved up and down safely; but that he, disregarding his ' duty when the cage was coming up with two workmen in it, of whom ' Reid was one, negligently omitted to take the proper means for ' stopping it, at or a few feet above the mouth of the pit, where there 'was a platform, on which the men ought to have got out, and 'allowed it to have been carried with great force to the top of the 'machinery, in consequence of which it was upset, and the men ' were thrown out and killed on the spot.

'On these facts the respondents, being the widow and children of 'Reid, claimed from the appellants, as the employers of Shearer, by 'whose neglect the misfortune had occurred, compensation in da-' mages, on the ground that the employers are chargeable with the

consequences resulting from the neglect of the servant whom they CLARK OF REID, employ.

'The appellants (defenders below), by their pleas in law, insisted, COAL Co.

'first, that no relevant ground of action was stated; and, secondly, Coal-pit accidentation that these facts alleged were not true. The Lord Ordinary repelled bility of emtended to the defence of want of relevancy, and the First Division adhered ployer for injuries to a work-to the interlocutors of the Lord Ordinary.

'The issues were then framed, for the purpose of trying the facts, the fault or ne-

*The issues were then framed, for the purpose of trying the facts, the fault or neand were settled as follows:—First, Whether the defenders were, gligence of a
in the month of September 1853, in the occupation, as proprietors fellow-workmen at the same or lessees, of the coal-pit at or near Baillieston, called the Dykehead
or lessees, of the coal-pit at or near Baillieston, called the Dykehead
ommon emor Bargeddie pit? and whether, on or about the 17th day of Sep-ployment.
tember 1853, the said deceased William Reid, while in the employment of the defenders in said pit, received severe and mortal injuries, through the fault of the defenders in the management of the
machinery for lowering and raising the miners or colliers at said pit,
or part thereof, in consequence of which he immediately, or soon
afterward, died, to the loss, injury, and damage of the pursuers.
These issues were tried before the Lord President, and evidence
was given for the purpose of showing that the accident arose from
the carelessness of Shearer. There was no evidence tending to show
that Shearer was incompetent to the due discharge of his duty;
on the contrary, all the witnesses described him as a steady sober
man, and a skilled workman, who had been acting as engineman in

' the appellants' service for several years.

'At the close of the evidence, the Lord President directed the ' jury as follows:-His Lordship said: "That if they were satisfied on the evidence, that the injury was caused by the culpable negli-'gence and fault on the part of Shearer in the management of the ' machinery, the defenders were, in point of law, answerable." ' defenders' counsel excepted to that direction, and asked a direction ' in the following terms:—" To direct the jury in point of law, that 'if the jury are satisfied on the evidence, that the defenders used ' due and reasonable diligence and care in the selection and appoint-4 ment of Shearer as engineman, and that Shearer was fully qualified to perform the duties of engineman, and furnished with proper ' machinery, and all necessary means for the performance of these duties, then the defenders are not, in law, answerable for the per-' sonal fault or negligence of Shearer in the management of the ma-'chinery on the occasion mentioned." The Lord President declined ' to give that direction, and exception was taken.

'The bill of exceptions was argued before the First Division of the Court, but it was disallowed, and the Court, by their interlocutor, decreed that the appellants should pay to the respondents the amount of damages assessed by the jury. I believe I am wrong in saying the amount assessed by the jury. The amount was agreed upon, but that is immaterial. From this decision the defenders have appealed to your Lordships.

'The question for decision is, Whether, in the working of a mine, if one of the servants employed is killed, or injured by the negli-

ployer for inju- of the other. ries to a workployment.

CLARKOT REID, ' gence of another servant, employed in some common work, that other servant having been a competent workman, and properly BARTONSHILL 'employed to discharge the duties entrusted to him, the common Coal-pit acci- 'employers of both are responsible to the servant who is injured, dent—non-lia- or to his representatives, for the loss occasioned by the negligence

'Where an injury is occasioned to any one by the negligence of man, caused by another, if the person injured seeks to charge with its consequences negligence of 'any person other than him who actually caused the damage. it a fellow-work- lies on the person injured to show that the circumstances were such man at the same 'as to make some other person responsible. In general, it is suffi-' cient for this purpose to show that the person whose neglect caused ' the injury was, at the time when it was occasioned, acting not on ' his own account, but in the course of his employment as a servant ' in the business of a master, and that the damages resulted from the 'servant so employed not having conducted his master's business 'with due care. In such a case the maxim "respondent superior" ' prevails, and the master is responsible.

'Thus, if a servant, driving his master's carriage along the high-'way carelessly, runs over a bystander; or if a gamekeeper, em-' ployed to kill game, fires at a hare, so as to shoot a person passing on the road; or if a workman employed by a builder in building a ' house, negligently throws a stone or brick from a scaffold, and so 'hurts a passer by,-in all these cases (and instances might be mul-'tiplied indefinitely) the person injured has a right to treat the 'wrongful or careless act as the act of the master.—qui facit per ' alium, facit per se. If the master himself had driven the carriage 'improperly, or fired carelessly, or negligently thrown the stone or ' brick, he would have been directly responsible; and the law does 'not permit him to escape liability because the act complained of was not done with his own hand. He is considered, and is reason-'ably considered, as bound to guarantee third persons against all ' hurt arising from the carelessness of himself, or of those acting un-'der his orders. Third persons cannot, or at all events may not, know whether the particular injury complained of was the act of ' the master or the act of his servant. A person sustaining injury ' in any of the modes I have suggested has a right to say, 'I was no ' party to your carriage being driven along the road, to your shoot-'ing near the public highway, or to your being engaged to build a If you choose to do, or cause to be done, any of these 'acts, it is to you, and not to your servants, I must look for redress 'if mischief happens to me as their consequence. A large portion ' of the ordinary acts of life are attended with some risk to third ' parties, and no one has right to involve others in risk without their ' consent. This consideration is alone sufficient to justify the wis-'dom of the rule, which makes the person by whom, or by whose ' orders, these risks are incurred, responsible to third parties for any 'ill consequences resulting from want of due skill or caution.

'But do the same principles apply to the case of a workman, in-' jured by the want of care of a fellow-workman, engaged together ' in the same work? I think not. When a workman contracts to Clark of Reid, do work of any particular sort, he knows, or ought to know, to what risk he is exposing himself; he knows if such be the nature Coal Co. of the risk, that want of care on the part of a fellow-workman may Coal-pit accibe injurious or fatal to him, and that against such want of care his bility of ememployer cannot possibly protect him. If such want of care should ployer for injurious, and evil is the result, he cannot say that he does not know ries to a work-whether the master or the servant was to blame. He knows that the salt or nether the blame was wholly that of the servant; he cannot say that the gligence of a master need not have engaged in the work at all, for he was a party fellow-work-man anatheesme common em-

'Principle, therefore, seems to me opposed to the doctrine that ployment.'
the responsibility of a master for ill consequences of his servants'
carelessness is applicable to the demand made by a fellow-workman
in respect of evil resulting from the carelessness of a fellow-workman
when engaged in a common work.

'That this is the view of the subject in England, cannot, I think, admit of doubt. It was considered in the Court of Exchequer in Priestly v. Fowler (3 M. & W. 1), afterwards fully discussed in the same Court in Hutchison v. York, Newcastle and Berwick Railway Co.; and acted on by the same Court in Wigmore v. Jay (5 Exch. 356). Those decisions would not, it is true, be binding on your Lordships if the ground on which they rested were unsound. But the circumstance of their having been acquiesced in, affords a strong argument to show that they have been approved of; more especially as, in the two first cases, the question appeared on the record, and might therefore have been brought before a Court of Error.

'I may add, that in the case of Skip v. The Eastern Counties 'Railway Co., in 1853 (9 Exchequer Reports, page 225), a question of a very similar nature to Hutchison's case occurred; but the counsel, in arguing for the plaintiff, tried to distinguish that case from those I have referred to, but did not attempt to impugn their authority; and afterwards, in a case in the Queen's Bench, Couch v. Steel (3 Ellis and Blackburn, 402), both Lord Campbell and Mr. Justice Wightman referred to Priestly v. Fowler, apparently with approbation. I think it has been stated at the bar in argument, in M'Guire's case, that there has subsequently been a case brought before the Court of Error, in which this doctrine has been recognized.

'I consider, therefore, that in England the doctrine must be regarded as well settled. But if such be the law of England, on what ground can it be argued not to be the law of Scotland? The law is established in England, and founded on principles of universal application, not on any peculiarities of English jurisprudence; and unless, therefore, there has been a settled course of decisions in Scotland to the contrary, I think it would be most inexpedient to sanction a different rule to the north of the Tweed from that which prevails to the south. Let us consider whether there has

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CLARK or REID, ' been such a settled course of decisions as was contended for by the ' respondents.

' First, it was argued that two cases have been recently decided Coal-pit acci- in this House inconsistent with the principle contended for by the dent-non-lia- 'appellants, namely, Paterson v. Wallace and Brydon v. Stewart. deni-non-na-' appellants, namely, Fauerson v. Wattace and England of the apployer for injuline to a work-' pellant, had been killed by the fall of a large stone, while he was
man, caused by ' working under ground in a mine. An issue was directed to try
the fault or nathe fault or ne-gligence of a the question, Whether the death was occasioned by the unsafe state fellow-work- of the roof of the mine, and the negligence and unskilfulness of the manatthesame owners in having so left it, when the workmen were sent to work 'there? Strong evidence was offered to show, that though the roof ' was in a dangerous state, yet its condition was known to Paterson. 'so that his death, which arose from his working under it, was the 'consequence of his own rashness, and not of any neglect of the 'owners. The learned Judge who presided was strongly of that ' opinion, and he told the jury that the pursuers could not recover. ' thus withdrawing the case from their cognizance. The defenders 'excepted to the direction of the learned Judge, but the Court of ' Session sustained it.

> ' Your Lordships, however, on appeal, considered the exception ' to have been well founded, and remitted the case, with a declara-'tion that there ought to be a new trial. Of the propriety of the 'course then taken by your Lordships, there cannot, I apprehend, 'be any doubt. The question was not as to any injury occasioned by the unskilfulness of a fellow-workman, but an injury occasioned 'by his own rashness, or by the roof not having been properly ' secured by the owners. The Judge withdrew this question from ' the jury, deciding the fact against the plaintiffs, and in favour of This was clearly out of the line of his duty; and the ' the owners. 'case was therefore remitted, for the purpose of being tried again. 'This case, therefore, affords no ground for contending that the law ' of Scotland differs from that of England.

> 'The other case, Brydon v. Stewart, was very similar. ' miners employed at piecework in working the coal, while in the pit, ' into which they had been let down in the usual manner, remon-'strated with the underground agent as to the state of the mine. 'complaining, amongst other things, that air was not adequately 'admitted, and also that their wages were not sufficient; and, on his refusing them redress, they declined to work any longer, and desired 'to be drawn up again. To this the agent acceded, and James ' Marshall, one of the men, the husband of the appellant, was, in the 'course of the ascent, thrown over and killed. An issue was directed ' to try whether the death of Marshall was occasioned by reason of ' the shaft being in an unsafe state, owing to the neglect of the own-The chief point made on behalf of the owners, and to which 'a large portion of the evidence was directed, was that the men were ' not justified in refusing to work, and that so the drawing them up ' was not in the ordinary course of their employment. The learned 'Judge directed the jury, that if they were satisfied that the men

' left their work without reasonable cause of complaint, and for pur-Clarkof Reid, poses of their own, then the owners were not responsible, even though the injury was caused by the insufficient condition of the Coal Coal of shaft. But in case the Court should think that not to be a sound Coal-pit accidirection in point of law, he told the jury to find, secondly, whether dent—non-liability of emtand insufficient condition of the shaft. The jury found on the ries to a work-first direction, that the men had no sufficient ground for refusing the fault or neto work; and, on the second, that the death arose from the shaft gligence of a not being in a safe and sufficient state. The Court of Session fellow-work-manathhesma thought, that as the men had no good ground for leaving their common em-

'directed the verdict to be entered for the defenders. Your Lord-'ships came to the conclusion, that the men had a right to leave 'their work if they thought fit, and that their employers were bound 'to take all reasonable measures for the purpose of having the shaft 'in a proper condition, so that the men might be brought up safely; 'and they therefore, pursuant to leave reserved by the learned Judge 'at the trial, directed the verdict to be entered for the plaintiff.

'The case, it will be observed, like that which preceded it, turned, 'not on the question whether the employers were responsible for 'the injuries occasioned by the carelessness of a fellow-workman, 'but on a principle established by many preceding cases; namely, 'that when a master employs his servant in a work of danger, he is 'bound to exercise due care, in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant 'against unnecessary risks.

'I think it clear, therefore, that these two cases decided by your Lordships do not bear out the proposition contended for by the

' respondents.

'Let us next consider the cases decided in the Court of Session.
'The first case relied on by the respondents was that of Sword v.
'Cameron (1 D. B. M. 493). There are some earlier cases, which it appears to me unnecessary to consider in detail. His Lordship referred to the circumstances of the case (reported ut supra).

'This case may be justified without resorting to any such doctrine, as that a master is responsible for injuries to a workman in his employ, occasioned by the negligence of a fellow-workman engaged in a common work. The injury was evidently the result of a defective system, not adequately protecting the workmen at the time of the explosions. It is to be inferred from the facts stated, that the notices and signals given were those which had been sanctioned by the employer, and that the workmen had been directed to remain at their work near the crane until the order to fire had been given; and then that, after the interval of a minute or two, the explosion should take place. The accident occurred not from any neglect of the man who fired the shot, but because the system was one which did not enable the workmen at the crane to protect themselves by getting into a place of security. The case, there-

BARTONSHILL

COAL CO. Coal-pit acci--Nonfellow-workployment.

CLARKOTREID, ' fore, is no authority for the proposition now insisted on by the ' respondents.

'Then came the case of Dixon v. Ranken (14 D. B. M., 420, in ' 1852). Then the accident occurred in consequence of a rope giv-'ing way, which had been used to fasten one of the spokes or arms dent—nonliability of emof a crab. His Lordship narrated the circumstances (reported ut ployers for in- 'of a crab. His Lordship narrated the circumstances (reported a juries to a work- 'supra). The Court of Session held that Dixon, the master, was man caused by responsible. The Lord Justice-Clerk (Hope) went fully into the negligence of a question of a master's liability for injury to his workmen occa-'sioned by the negligence of fellow-workmen, and clearly and emman at the same, phatically stated that the law of Scotland recognised no such dis-'tinction as that which had been acted on in England; and Lord ' Cockburn stated to the same effect. I feel, therefore, that in 'advising your Lordships to come to the conclusion that the same ' principles which had led to the English decisions ought to prevail 'in Scotland, I have to encounter the very high authority of the 'eminent judges whose names I have mentioned. But this cannot 'be avoided, and I think it will appear that the opinion of the 'Lord Justice-Clerk and Lord Cockburn have not by any means 'been universally assented to in Scotland. The decision itself ' might, perhaps, be justified, even though the English rule was ad-' mitted; for the evidence went to show that the machinery was ' defective, and that no proper precautions had been taken by the 'owners to put it into such a condition as would prevent unneces-' sary risk to the lives of those who were employed in the mine; and ' Lord Murray expressly stated that to be the ground on which he 'rested his decision. If the owners had failed in taking due pre-' cautions to have proper machinery, this would exclude the opera-'tion of the principle established by the English cases. ' Medwyn, the other judge by whom the case was decided, declining ' to express any opinion on the doctrine established by the English 'cases, intimated a strong doubt whether the facts warranted any ' judgment against Dixon, the owner. Lord Medwyn considered ' the result of the evidence to be that Neilson, when he lost his life, ' was not acting in the service of his master; but that, on the con-' trary, after the action of the crab had been stopped, he remained, ' contrary to express orders, lounging on the spokes, and so exposed ' himself unnecessarily to the danger of that which eventually deprived him of his life. If this were so, the decision was certainly wrong. But it is unnecessary to go into any inquiry on that head. 'The judgments of the Lord Justice-Clerk and Lord Cockburn went 'clearly on the ground that the death had resulted from the negli-'gence of a fellow-servant, while the person injured was acting in 'the service of his master. Those two eminent judges held that 'in such a case the master was liable. Lord Medwyn and Lord ' Murray, on the other hand, took care to explain that they gave no 'opinion as to the ground on which the Lord Justice-Clerk and Lord ' Cockburn proceeded.

> 'The next case was that of Gray v. Brassey (15 D. B. M., 135). 'There the summons stated that Brassey was contractor for the

'maintenance of the Caledonian Railway, and that it was the duty CLARKOTREID, of the defendant as such contractor, or of those acting for his behoof, to use all requisite precautions for the safety of the workmen COAL CO. that it became the duty of the pursuer, as one Coal-pit accifor the workmen, to uncouple one of the waggons on the line, and, dent—Non-liability of emform the stepping on the brake for that purpose, it slipped down ployers for inswith him, in consequence of there being no block on it, which it juries to aworkwas the duty of Brassey, or those acting for his behoof, to have the fault or seen attached thereto; and the consequence was, the pursuer fell, negligence of a and was so injured that he lost his leg, and that this injury arose fellow-workfrom the culpable neglect of Brassey, or of Simpson, as his man atthesane ployment.

'The question was as to the relevancy of the summons. 'Ordinary, and also the Court of Session, held it to be relevant. 'The summons stated that the accident happened, not from the 'negligence of a fellow-workman, but because Brassey, the em-'plover, or those for whom he was responsible, had omitted to 'attach a block to the brake where it ought to have been attached. 'The judges certainly did not proceed on the ground that a master 'is in all cases liable for injury occasioned to a workman from a 'fellow-workman. On the contrary, the Lord President in his judgment said that, with very trifling exceptions, he agreed with the law as laid down by the Court of Exchequer in Hutcheson v. ' The York, Newcastle, and Berwick Railway Co. He considered 'the question to turn on what is to be regarded as common service. ' He intimated that it is not enough that the servant injured, and the ' servant causing the injury, should be servants of the same master. 'They must be employed in the same work. And he observed truly, ' that if a gentleman's coachman were to drive over his gamekeeper, 'the master would be just as responsible as if the coachman had 'driven over a stranger. Lord Ivory is even more distinct; he ' clearly intimates that if the meaning of the defendant's plea was, ' that though the master in the choice of his servants and the suffi-' ciency of his machinery, was free from blame, he may yet be made ' liable for any injury to a workman, he thinks such a plea may be 'bad. The opinions thus enunciated are, as I conceive, in strict 'accordance with the doctrine of the English cases.

'The only other case relied on was that of O'Bryne v. Burn, in '1854 (16 D. B. M., 1025).

'There the plaintiff was a girl employed by the defendant in his clay mill. She was altogether inexperienced, having been only nine days in the defendant's service, and she was therefore unaware of the risks from the machinery. Anderson, acting under Burn, as the manager of the works, put her to remove some waste clay while the rollers were in motion. This was a duty which Anderson ought to have performed himself, and it ought not to have been done at all till he had caused the movement of the rollers to be suspended. The pursuer, in attempting to remove the waste clay, in obedience to Anderson's orders, sustained a very severe injury from the rollers in making the attempt. And she

BARTONSHILL of the cause. Coal-pit acci--Nonfellow-workployment.

CLARK or Reid, ' raised an action against Burn for damages. The Lord Ordinary ' held the allegations relevant, so as to entitle her to issues for trial

'This might have been quite right. It may be, that if a master 'employs inexperienced workmen, and directs them to act under the liability of em'employs inexperienced workmen, and directs them to act under the ployers for in'superintendence and to obey the orders of a deputy whom he puts juries to swork- in his place, they are not within the meaning of the rule in quesman caused by tion—employed in a common work with the superintendent. negligence of a 'They are acting in obedience to the express commands of their em-'ployer, and if he, by the carelessness of his deputy, exposes them man in the same to improper risks, it may be that he is liable for the consequences.

'On this review of the cases, therefore, it appears to me that there is no clear settled course of decision in Scotland imposing on ' this House the necessity of holding the law of that country to be ' different from that of England; and I think that general principle ' is altogether in favour of the rule established hera. When several ' workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves. ' including the risks of carelessness, against which their employer 'cannot secure them, and they must be supposed to contract with reference to such risks. I do not at all question what was said by ' the Lord President, that the real question in general is, - What is 'common work ! It is not necessary for this purpose that the work-' man causing, and the workman sustaining, the injury, should both be engaged in performing the same or similar acts. The driver ' and guard of a stage-coach—the steersman and the rowers of a boat · —the workman who draws the red-hot iron from the forge, and ' those who afterwards hammer it into shape—the engineman and ' the signalman on a railway—are all engaged in one common work. 'So, in this case, as to the engineman and the miners: they are all 'contributing directly to the common object of their employer in · bringing the coal to the surface.

' I am therefore of opinion, that the exception to the ruling of the · Lord President at the trial ought to have been allowed, and consequently, that the third and fourth interlocutors appealed against ought to be reversed. I think, further, that the first and second · interlocutors appealed against ought to be reversed, on the ground that no relevant case is stated on the part of the pursuers.

The case, as made in the sixth article of the Condescendence. attributes the accident entirely to the neglect and carelessness of · Shearer, the engineman, and as there is no statement in that article that the appellants had failed to exercise due care in the selection of an engineman, or that they had any reason for distrusting the · competency or carefulness of Shearer, no case is there stated inferring liability on their part to the pursuer. It may be that, looking to the three next articles of the Condescendence, a relevant case, if · the averments which they contain are sufficiently specific, is stated. · But I do not feel called on to go into any consideration on this head, for the Lord Ordinary, by his note appended to the interlocutor of the 6th Pecember 1854, expressly states that the discussion



'as to relevancy had been taken, and he evidently means exclusively Clarkor Reid. ' taken on the sixth article of the Condescendence. Indeed, this trust have been so, for otherwise the issues, as framed, to which Coal Co. both parties assented, and which must have been intended to ex-Coal-pit accihaust the whole subject, put the claim of the pursuer entirely on dent—non-liability of emthe fault of the appellants (i. e., of Shearer their servant) in the ployer for inju-' management of the machinery, not at all on the neglect of the ap-ries to a work-'management of the machinery, not at all on the neglect of the ap-nes wa work-'pellants (if there had been neglect) in providing proper machinery the fault or ne-'and a competent engineman. Unless, therefore, the appellants are gligence of 'responsible for the carelessness of Shearer, (which in my opinion fellow-work-'they are not), no relevant case is stated.

man at the same

'Before I dismiss the case, I am anxious to refer to a very able playment. ' and elaborate judgment of Chief-Justice Shaw on this subject, in a ' case which was decided in the year 1842, in the Supreme Court of Massachusetts; I allude to the case of Farwell v. The Boston and ' Worcester Corporation, (4 Metcalfe, 49). The plaintiff in that 'action was an engineer in the service of the defendants, and was 'engaged in running a passenger train on their line. In consequence ' of the neglect of one Whitcomb, another servant of the defendants, one of the switches had been improperly left across the line, and 'the consequence was that the engine was carried off the line, and ' the plaintiff was severely injured. It was admitted that Whitcomb 'was a careful and trustworthy man, who had long been entrusted ' with the care of the switches. On these facts, the Court held that 'the defendants were not responsible to the plaintiff. 'Justice, in a very able judgment, discussed the whole subject. ' held that the plaintiff and Whitcomb must be considered as ser-' vants engaged in one common work under the defendants, and that 'every servant engaging in a service attended with danger, must be ' supposed to take upon himself the risk of all perils incident to the ' service he is undertaking, including those arising from the careless-'ness of fellow-servants employed in the same work. ' judgment is well worth an attentive consideration. It is sufficient ' to me to say that it recognises, and in the fullest manner adopts the English doctrine, resting as it does on principles of universal appli-'cation.' (Lord Cranworth).

In the relative case of M'Guire against the same defenders, lying over for judgment on the same grounds, the Non-liability of following observations were made by the Judges. advising, (17th June 1858.—Jur. 30, p. 606),—

M'GUIRE v. BARTONSHILL COAL CO. master for in-Atjuries to servant caused by the fault of a fellow-servant.

LORD-CHANCELLOR (Chelmsford).—'My Lords, I think it will be 'unnecessary for your Lordships to hear the reply in this case, being ' the same in its circumstances as that of the Bartonshill Coal Com-'pany v. Reid, upon which your Lordships have just heard the 'carefully-considered opinion of my noble and learned friend, in 'which I entirely concur. I will, therefore, not trespass at any ' length upon your Lordships' attention. By consent of the parties, vant caused by the fault of a

M'Guire v. 'for the purpose of avoiding unnecessary expense, it was ordered BARTONSHILL' that this case should, so far as regarded the first and second pleas Non-liability of 'of the defenders, abide the decision thereof in Reid's action. and master for in-' that the same judgment should be pronounced in both cases on juries to ser-, these two pleas. The questions to be decided are,

' First, whether James M'Guire, the deceased, and James Shearer, fellow-servant ' were fellow-labourers engaged in one common employment; and ' secondly, if they were, whether the death of M'Guire having been 'occasioned by the carelessness and negligence of Shearer in the ' course of this employment, without any proof of general incompe-'tency for his duties, or of defectiveness of the machinery, their ' mutual employers are liable in damages for the event. It has long ' been the established law of this country, that a master is liable to ' third parties for any injury or damage done through the negligence ' or unskilfulness of a servant acting in his master's employ. ' reason of this is, that every act which is done by a servant in the 'course of his duty is regarded as done by his master's orders, and 'consequently to be the same as if it were the master's own act, 'according to the maxim, qui facit per alium facit per se.

'A little more than twenty years ago it was attempted, for the ' first time, to apply this principle to the case of an injury sustained by a servant from his fellow-servant employed together in the 'same work; and it was decided, in the case of Priestly v. Fowler, ' that an action could not be maintained against the master under 'such circumstances. This case was followed and confirmed by 'subsequent decisions, which have been all brought before your ' Lordships in the course of the argument,—Hutcheson v. The New-'castle, York, and Berwick Railway Company: Wigmore v. Jay: ' Wigett v. Fox; and Degg v. The Midland Railway Company;

' and other cases which have been cited.

'In the consideration of these cases, it did not become necessary 'to define with any great precision what was meant by the words "common service," or "common employment;" and perhaps it might be difficult beforehand to suggest any exact definition of ' them. It is necessary, however, in each particular case, to ascertain ' whether the servants are fellow-labourers in the same work, be-'cause, although a servant may be taken to have engaged to en-'counter all risks which are incident to the service which he under-' takes, yet he cannot be expected to anticipate those which may 'happen to him on occasions foreign to his employment. ' servants, therefore, are engaged in different departments of duty, 'an injury committed by one servant upon the other, by careless-'ness or negligence, in the course of his peculiar work, is not within 'the exception, and the master's liability attaches in that case in ' the same manner as if the injured servant stood in no such rela-'tion to him. There may be some nicety and difficulty, in peculiar 'cases, in deciding whether a common employment exists; but in general, by keeping in view what the servant must have known or expected to have been involved in the service which he under-' takes, a satisfactory conclusion may be arrived at.

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'The Lords of Session, in the case of Reid, decided "that Shearer MiGuirre " ' and the deceased were not collaborateurs, because Shearer had the BARTONSHILL 'superintendence of the machinery for lowering and raising the men Non-liability of 'and the materials from the mine-a superintendence which took master for in-' his duties altogether from common employment with the men juries to ser-'below, and that the deceased's business was to excavate coal from the fault of a the pit—a line of business entirely different from that of engine fellow-servant. 'man." But, my Lords, it appears to me that the deceased and 'Shearer were engaged in one common operation—that of getting ' coals from the pit. The miners could not perform their part un-' less they were lowered to their work, nor could the end of their common labour be attained unless the coal which they got was raised to the pit's mouth; and of course, at the close of their day's labour, the workmen must be lifted out of the mine. person who engaged in such employment must have been perfectly aware that all this was incident to it, and that the service was necessarily accompanied with the danger that the person entrusted ' with the machinery might be occasionally negligent, and fail in ' his duty.

'The Lord Advocate put the case of a master undertaking to ' convey his workmen to their place of work in the morning, and to ' bring them home in the evening, as being similar to the present one of lowering the workmen to their work, and taking them up 'when it is over; and he asked whether it could be doubted that, ' if something were deducted out of the workmen's wages for their 'conveyance to and from their work, the master would be liable. ' Now, in the latter case supposed, it may be very probable that the ' master would be liable for damages to the workmen for the negligence of his servants in the course of the journey, because he has ' for this purpose converted himself into a carrier for hire. And so ' it may be if the employer, in this case, had entered into an express ' contract with the miners to lower them into and raise them from ' the mine; he might have put off the mere relation of master for 'this duty, and undertaken that of a contractor. But we are here ' dealing with no such special and precise cases, but with an engage-'ment in a service subject to all the necessary incidents of it, 'and as essential to, and forming a part of that service—the very 'act, by negligence in the performance of which, by one of the ser-' vants engaged in the common work, the death has been occa-' sioned.

'Whatever difficulties may occur, in some cases, in determining ' whether the parties are engaged in a common employment, I feel 'no doubt that the relation in which Shearer and the deceased stood ' to each other, would satisfy the strictest definition which could be ' given of the term.

'It only remains to make a few observations on the second question, 'as to the liability of the employers of Shearer and the deceased to 'the damages which have been found by the jury, for the fatal con-'sequences of Shearer's negligence. If this case had arisen in this country, it would be unnecessary to do more than to refer to the fault of a fellow servant

' different decisions upon that subject in which, founded as they are BARTONSHILL on reasons which recommend themselves to the judgment, Your Non-liability of Lordships would probably have acquiesced. But it said, that whatmaster for in- 'ever may be the law in England, which has only recently broken in juries to ser- 'on the principle of the liability of the master for the negligence of vant caused by 'on the principle of the manning of the limited at the vant caused by 'his servants; there is no such law existing in Scotland. I own I was surprised to hear the assertion made, because I had assumed that ' the authorities in England had been based upon principles which were not of local application, nor peculiar to any one system of ' jurisprudence. The decisions upon the subject in both countries are of recent date, but the law cannot be considered to be so; the prin-' ciples upon which these decisions depend, must have been lying deep 'in each system, ready to be applied when the occasion called them ' forth. It will be unnecessary for me, after the complete and satis-' factory manner in which my noble and learned friend has inves-'tigated the cases which have been decided in Scotch Courts, to ' follow him minutely in the same course, and show that all of them ' are reconcileable with the decisions in England, and that, with the 'exception of occasional dicta of some of the Scotch Judges, there ' is nothing in them to show that there is any real difference in the 'law of the two countries. In Sword v. Cameron, the system of ' blasting in the quarry which had been established, had been habit-' ually defective, and therefore the injury which resulted might as ' much be attributed to the employers, as if they had supplied de-' fective machinery, for which undoubtedly they would have been 'answerable. The case of Sneddon v. Addie, was a case of damage ' through insufficient machinery, upon which it is conceded that the employers would be liable. And this was also the case in Digon 'v. Ranken, for there it was said by the Lord Justice Clerk, "It 'appears, that with that disregard for the safety of workmen, which seems eminently to characterize all the machinery management, and ' other operations in a great many coal and other pits, the crab has 'no teeth or checks to prevent a reverse movement, and that is said ' to be a common defect." And again he says, "The recklessness of ' danger on the part of the men is a result of the trade in which the ' master employs them, and he is bound in all such cases, to hire 'superintendence, which will exclude such risks as occurred here. 'especially and peculiarly when his machinery is defective, in not ' having the checks which exclude any reasonable chance of danger." 'In O'Bryne v. Burn, it was hardly possible to apply the principle ' of the servant having undertaken the service with a knowledge of ' the risks incident to it. She was an inexperienced girl, employed ' in a hazardous manufactory, placed under the control, and it may ' be added, the protection of an overseer, who was appointed by the ' defendant, and entrusted with this duty, and it might well be con-' sidered, that by employing such a helpless and ignorant child, the ' master contracted to keep her out of harm's way, in assigning to 'her any work to be performed. The case of M'Naughton v. the 'Caledonian Railway Company, (19, D. B. M. 271,) may be sustained, without conflicting with the English authorities, on the

' ground that the workmen in that case, were engaged in totally dif- M'GUIRE A. ferent departments of work. The deceased being a joiner or car-BARTONSHILL openter, who, at the time of the accident, was engaged in repairing Non-liability of 'a Railway carriage, and the person by whose negligence his death master for in-

was occasioned, were the engine-driver and the person who arranged juries to ser was occasioned, were the engine-driver and the person who arranged want caused by the switches. It is in this case, however, more than in any other, fault of a fellow that the language of the judges is directed in too unqualified terms servant.

'against the exemption of masters from liability for injuries happen-

'ing between fellow-servants.

'The conclusion, as my noble and learned friend has clearly 'shewn, is, that there is no decision in the Scotch Courts, which is ' not capable of being reconciled with the authorities upon the sub-'ject in our courts; although there are occasional dicta of the judges, which strongly tend to raise a distinction between them. 'I am satisfied that the principle upon which the English Courts ' have proceeded is the correct one, and ought to be applied to this ' case, and I am fortified in this opinion by the case mentioned to 'your Lordships, by my noble and learned friend, as having been determined in the Court at Massachusetts; because the ' judges in America are in the habit of investigating general principles most closely, and applying them with great accuracy to the ' cases brought before them, so as to make them of general use and 'application. For these reasons I cannot help concluding, that the 'appellants in this case were not liable for the death of M'Guire, 'occasioned by the negligence of Shearer, and that, therefore, the 'Interlocutors of the Court below, of July 1855, are wrong and ' ought to be reversed.'

LORD BROUGHAM.—My Lords, I entirely agree in the opinion which has been expressed by my noble and learned friend. I had some little doubt at first as to the Scotch Law, upon reading the elaborate note of Lord Ardmillan, but when I came to examine his note, I find that he states cases, some of which, past all doubt, would not fall within the English rule of exemption any more than they would within the Scotch rule; other cases, he states, upon which there may be some doubt, such as the case of M'Naughton v. the Caledonian Railway Company. As my noble and learned friend has just stated, the decision in that case could not well stand with our reversal of the decision, and with what I consider to be the established rule of law upon the subject.

As an illustration of what I have said respecting Lord Ardmillan's note, I will just point out how he has misstated, or at least, misapprehended the English Law. He gives a number of instances, and he says, 'If the absolute rule maintained by the defenders is well 'founded the masters would in all these cases be exempt from ' responsibility, a very startling result to a Scotch lawyer, for whatever support to such a rule may be found in some of the decisions ' of the Courts, and more particularly in some of the dicta of the ' learned Judges in England, there is neither precedent nor authority 'in the law of Scotland in favour of it, and the Lord Ordinary is 'humbly of opinion, that an absolute and inflexible rule, releasing servant.

'the master from responsibility in every case where one servant is BARTONSHILL 'injured by the fault of another, is utterly unknown to the law of Coal Co. Scotland. But, my Lords, it is utterly unknown to the law of master for in-England also. To bring the case within the exemption, there must uries to ser- be this most material qualification, that the two servants must be men value caused by fault of a fellow in the same common employment, and engaged in the same common work, under that common employment.

Judgment of Court of Session reversed.

John Lumsden 1st February 1856.—John Lumsden against James Russell & Son.—18 D., p. 468, Jur. 28, p. 181. JAMES RUSSELL

& Son. Coal-pit acci-dent—fault on

The pursuer was a miner in the employment of the depursuer, non-liability of mas-fenders, lessees of a coal-pit near Bathgate, and in November 1853 his son, a boy of nine years old, came to the pit with gunpowder to his father. While at the pit, he was asked by one of the men to go to the water barrel for some The barrel was situated between the pit-mouth and the winding shaft of the engine, and the usual mode of access to it at the time was by stepping across the engine shaft by means of a plank placed for the purpose. The boy in going across took hold of the winding chain, and the engine having been set in motion he was drawn up and His father raised this action, concluding crushed to death. for £500 of damages. It was founded on the averment that the engine house was of imperfect construction, there being no window by which the engineman could see the shaft, or management of the gearing; that the door opened in the wrong direction, and concealed all view of the revolution of the chains round the pins, and that these defects had been remedied since the date of the accident. stated that the winding chain ought to have been fenced.

The defence was—that the boy was at the pit not only without, but contrary to express orders, and that his death was not in the circumstances attributable to their misconduct, but was entirely owing to the culpable recklessness of the pursuer himself, in allowing his son to come to the pit and be sent on such an errand.

The Lord Ordinary held that no relevant case had been libelled to subject the defenders, adding the following

note:—"In order to support the conclusion for damages John Lumsden the pursuer must allege culpa on the part of the defenders, James Russell or those for whom they are responsible, and he must so Coal-pit acci-connect the accident with the culpa, as to deduce clearly dent—faul on the liability which he seeks to enforce.

The peculiarity of the case is, 1st, that the person injured, a boy, as was admitted at the bar, of 9 or 10 years of age, was not in the employment of the defenders, and was, when he met with the accident, in a place where he had no lawful business or occasion to be, and where no child was expected to be: and 2nd, that the boy took hold of the winding chain at the side of the shaft, which act of his in so taking hold of the chain led directly to the accident.

' If one of the workmen had passed where the boy went. ' he would not have been so foolish as to lay hold of the 'chain, and then the accident would not have happened. 'But it cannot be said to have been part of the duty of 'the defenders to calculate on a child going instead of a 'man, and to guard against the possibility of an act so ' rash and so improbable, as the laving hold of the winding But for that voluntary act there would have been ' no accident. It is not alleged that children were usually, 'or even occasionally, employed at the pit, or that the ' presence of the deceased, or of any children there, was to be contemplated and provided against, and then it ' is alleged that the act of the child directly led to the The pursuers say that the winding chain 'accident. ' was not fenced or protected, so as to prevent persons from 'coming in contact with it. But the deceased did not ' come in contact with it as these words are generally un-He went there without occasion, voluntarily, ' and not in the defender's service, and, being so there, he ' took hold of the chain.' The danger of a boy being killed by the winding chain of machinery at a coal-pit, when the boy had no business there, when the place was not public. or situated so near a public road as to be hazardous---when there was no danger except to the rash and reckless, and when the boy himself rashlessly and needlessly laid hold of the chain by which he was killed, does not appear to the Lord Ordinary to be a casualty against which the

JOHN LUMSDEN defenders were bound to provide, or for which they are JAMES RUSSELL responsible.

& Son.

Coal-pit accident—fault on from insufficient fencing. This cannot be put as the simple case of an accident The deceased did not fall into pursuer, non-liability of mas-' an unfenced pit. He laid hold of what he had no right ' to touch, and he was killed in consequence. ' cases of liability from insufficient fencing, the element of 'accident or casual injury is introduced (Black v. Caddell, 9th 'February, 1804, Histor v. Durham, 14th March, 1842) 'And in no case that the Lord Ordinary is aware of. has 'action been sustained, where there was not merely a tres-' pass in going to the place, and recklessness on the part of 'the injured party in exposing himself to danger, but a 'voluntary act, unauthorised and unnecessary, leading ' directly to the result. It is not sufficient to protect from ' liability, that the injured party was trespassing, though it ' is a circumstance unfavourable to the action, but where 'there is a combination of trespass in regard to presence, ' and recklessness in regard to conduct—where the injured ' person was in a place where he had no business to be, and ' was doing what he had no right to do, and where he by ' his own hand, recklessly caused the accident from which ' he suffered, he is the author of the calamity, and cannot ' recover damages. In this case the deceased party was a 'very young boy, but as he was not in the defenders' em-' ployment, and was not in a place where young boys were 'entitled or expected to be, his want of judgment and ex-' perience cannot extend to the responsibilities of the de-'fenders, (Davidson v. Monklands Railway Co., 5th July, (1855.)

The pursuer reclaimed, but the Court adhered.

LORD JUSTICE-CLERK.—The Court is always extremely jealous of any want of due precaution by which workmen are injured, and I quite agree that it is not enough for the master to lay down any general rules as to the distance people are to keep from machinery, and so on, because we know very well that such regulations cannot be enforced. If the machinery and works are in bad order, and an accident occurs, the master would still be liable, but there are limits to such liability, and I own I cannot conceive a stronger case of nonliability than this. Look at why this boy came to the work. fault was in the father allowing him to come to the pit. father neglected to take the gunpowder himself, then it was his fault, and, at all events, a little boy, nine years old, was certainly not the

proper party to bring such an article as this. The boy was not em- Lumsden v. ployed by the master to bring this powder, and the whole fault is Russel & Son.

the father's own. He was most culpable in bringing the boy into dent, fault on
the neighbourhood of the pit with such an article. It is the duty pursuer, nonof parents employed in such works to keep their children away. liability of masThey know the danger and yet this man sends this boy to a place tera. They know the danger, and yet this man sends this boy to a place he never should have been sent to at all. It is the nature of boys to go into, to gaze at, and to meddle with things they do not understand. Well then, the pit-headman here asked the boy to go for water. Whose fault was it that he was sent? Was it not the father's himself? In the next place, was this a proper act of the workman. and within the sphere of his duty to send this boy? Certainly not. He, knowing the place and all about it, not acting in his master's business, but just to save himself the trouble of getting water, sends this boy to a place, on the pursuer's own showing, of a most dangerous character. The boy goes, is caught by the chain and killed. It is said, the Messrs. Russell have now remedied this, which is very creditable to them, and very proper, but does not bear on the question as to their liability. I have no hesitation in adhering to the Lord Ordinary's Interlocutor.

LORD MURRAY.—I entirely concur. Every coal-miner, or other employer is bound to make his works safe, and is liable for accidents to their workmen; but there is also a duty on parents to their children, and this parent was very culpable in sending his son, a boy of nine years old with gunpowder to such a place. This was extremely

LORDS Wood and COWAN-agreed.

20th February 1856.—Wigger v. Fox, &c. 25 L. J. Exch. Pleas. 188.

WIGGET v. Fox & Co. Non-liability of contractor for injury to the

The defendants were the contractors for the erection of workmen of a sub-contractor, the Crystal Palace, and Joseph Moss and four other persons caused by the had agreed with the defendants to execute certain piece workmen while work connected with the water works at the High Water engaged in a common work. Towers, for £400. By the written contract, Moss and his co-contractors agreed to execute the work in conformity with certain regulations annexed. It was agreed that the work should be done in a workmanlike manner, and to the satisfaction of Fox, Henderson, & Co., and of the engineer of the Crystal Palace Co.—Fox, Henderson, & Co. to find all hoisting power and tools necessary for the execution of the work-Moss and the others to find their own enginedriver, but to be under the control of Fox, Henderson, &

killed Wigget.

Wrocer v. Co.—the work to be measured up once a month, and the Fox & Co.

Non-liability of balance then found to be paid, reserving £10 per cent. of contractor for such balance until the whole contract was concluded, when workmen of a the amount would be paid according to the regulations, as sub-contractor, caused by the agreed to by persons in the employment of Fox, Hender-contractor's workmen while son, & Co. Moss & Co. employed several persons to work engaged in a at the piece-work, and among others the deceased John Wigget, who was previously in the service of the defendants; he was at work on the piece-work at the base of the towers at the time of the accident. At the same time, workmen employed directly by the defendants were at work on the top of the tower fixing iron plates to form a tank—such work forming no part of the contract—and a heavy

In accordance with the agreement and regulations, the time-keeper of Moss & Co. made out their list, giving an account of all their labourers' time, and sent it to the defendant's cashier, who paid the labourers, including Wigget, from their time-sheet weekly at defendants' pay-board, and at the end of every month an account was struck between defendants and the sub-contractors.

tool used by them fell over the edge of the scaffolding, and

The Judge, reserving leave to defendants' counsel to move to enter a verdict for them, left it to the Jury to say whether the accident was the result of the defendants' servants, and whether Wigget was, at the time of the accident, a servant of the defendants or the servant of Moss & Co.

The jury found that the accident arose from the negligence of the defendants' servants, and that Wigget was the servant of Moss & Co., the sub-contractors—damages £80. A rule was obtained to enter a verdict for defendants, or for a new trial, on the ground that deceased was shewn to be a servant of defendants, or so engaged in common occupation with the defendants' servants, as to render the latter not liable for the negligence complained of, and that the verdict on that point was against evidence.

ALDERSON, B.—We think this case must be determined in favour of the defendants. The principle on which our opinion is founded, is to be found in *Hutcheson* v. The Newcastle, York, and Berwick Railway Co., and it is this: that a master is not generally respon-

sible to one servant for an injury occasioned to him by the negli- Wigger v. gence of a fellow-servant while he is acting in one common service; Fox & Co. and the reason for that, in another part of the judgment, is stated contractor for to be that the servant undertakes, as between him and the master, injury to the to run all ordinary risks of the service, including the risk of negli-workmen of a gence of the other servents engaged in discharging the work of the sub-contractor, gence of the other servants engaged in discharging the work of their caused by the common employer. Here both servants were at the time of the in-contractor's jury, engaged in doing the common work of the whole contract, and workmen while for the contract, and engaged in a for the contractors and defendants; and we think that the sub-common work. contractor and all his servants must be considered as being for this purpose the servants of the defendants whilst engaged in doing the work—each devoting and limiting his attention to the particular work necessary for the completion of the whole work; and that, otherwise, we should not give full effect to the principle which governs such cases, as stated in Priestly v. Fowler, and necessarily arises from the enormous inconvenience that would follow from holding the common employer liable under such circumstances. Here the workman comes into the place to do the work, knowingly and avowedly, with others. The workman may, if he thinks fit, decline any service in which he apprehends injury will result to himself; and, in cases in which danger is to be apprehended, he is just as likely, and probably more so, to be acquainted with the risk he runs than the common employer. If we were to hold the defendants liable, we should be obliged to hold that every contractor, where various painters, carpenters, plumbers, or bricklayers were employed in building a house, would be liable for all accident inter se to the various workmen so employed on the common object; and, perhaps, it is even difficult to say whether it could stop there: for, possibly, the common employer would be made liable in such cases. indeed, there were any ground for holding that the person, or persons, whose act caused the death of the plaintiff's husband, were persons not of ordinary skill and care, the case would be different, for the defendants were certainly bound to employ persons of ordinary skill and care in the work, but there is no suggestion of this sort. We think, therefore, a nonsuit should be entered. The only liability is on the servant by whom the act itself was done, not on the defendants.

Judgment for defendants.

27th February 1856.—George Cleghorn against Dr CLEGHORN v. JOHN TAYLOR, &c.—(Spittals' Trustees) Defenders.—18 TAYLOR, &c. Liability of pro-28 Jur., p. 287. D., p. 664.

The action was for damage done by a chimney-can, with ant of an adjoining subject, an iron turning top, falling from a tenement belonging to caused by the the defenders, on the glass roof of the pursuer's adjoining his property. warehouse, and causing great damage.

prietor for da-

CLEGHORS n. TAYLOR, &c. Liability of proprietor for da- a mage to the ten ant of an adjoining subject, caused by the his property.

The following was the issue tried by the jury:-. Whether, in and prior to the month of September 1854, the pursuer was tenant of a shop or wareroom in a tenement. No. 12 St Andrew Square. Edinburgh: and whether. previous to, or in or about the month of September 1854. insufficiency of, the defenders did cause or allow to be put up over one of 'the vents in a wall between their premises and the pre-'mises occupied by the pursuer, a chimney-can and iron 'turning top in an insecure and insufficient manner; and 'whether, in or about the month of October of the said ' year, the said chimney-can and iron turning top did in 'consequence thereof, fall from the said vent, and a portion of the said chimney-can did break through the roof of the 'pursuer's warehouse, and did destroy and injure a portion of the pursuer's goods therein situated, to the loss and ' damage of the pursuer. Damages laid at £160.'

A special verdict was returned, in which the jury

'Say, upon their oath, that in respect of the matters ' proven before them, they find that in and prior to the 'month of September 1854 the pursuer was tenant of a 'shop or wareroom in a tenement. No. 12 St Andrew Square. ' Edinburgh. That previous to, or in or about the month of September 1854, there was put up over one of the 'vents in a wall between the defender's premises and the ' premises occupied by the pursuer, a chimney-can and iron turning top, in an insecure and insufficient manner; and 'that, in or about the month of October of the said year, the said chimney-can and iron turning top did, in conse-' quence thereof, fall from the said vent, and a portion of ' the said chimney-can did break through the roof of the ' pursuer's warehouse, and did destroy and injure a portion ' of the pursuer's goods situated therein, to the loss and ' damage of the pursuer. Further, the jury find that the ' defenders did not wilfully cause, or knowingly allow, the said chimney-can and top to be put up in an insecure and 'insufficient manner. That they authorised Mr. David 'Smith, their tenant in the premises, to get them put up. 'That Mr. Smith employed for that purpose Mr. Andrew 'Slater, a master slater, to put up the same; and that the defenders thereafter approved of Mr. Smith's having so em' ployed him. That the said can and top were put up in CLEGHORN v. 'an insecure and insufficient manner by Mr. Slater's work-Liability of promen. That neither the defenders nor Mr. Smith interfered prictor for damage to the tenin the execution of the work, or the manner in which it and of an adjoining subject,
was executed; nor did they do or say anything incon-caused by the
sistent with its being done in a secure or sufficient manner. his property. 'That the loss suffered by the pursuer by the destruction 'and injury of his property, was £106, 16s. 8\frac{1}{6}d., being the 'price and value of his goods destroyed, and £10 extra ' damage for broken plates in sets of china, thereby rendered And, with these findings, it is left to the 'Court to enter up the verdict for the pursuer or for the ' defenders, according as the Court may think that the ver-' dict ought, on the facts found, to be for the one party or 'the other; and subject to the further question, whether 'the damages of £10 under the second head are a compe-' tent and admissible claim under the terms of the record ' and issue.'

The question came before the Court for the application of the verdiet.

The pursuer maintained liability in respect that the defenders, as proprietors, are responsible for the chimney-can being put up in an insecure manner; that the act of the parties putting it up was their act, and they must be responsible for damage done to others through the insufficiency of their property. There was a distinction where the work was done and taken off the contractor's hands, as to the remedy being against the workman who put up the can. Had the accident happened while the slater was in possession of the premises, and was actually executing the job, he might be held liable, as in the case of M'Lean v. Russell, M'Nee and Co. But here the can did not fall till seventeen days after he had left.

The defenders pled that as there was no culpa on the defenders, there could be no liability. The question was, is the owner liable, or is it the contractor? The case of Russell, M'Nee and Co., settled the point in favour of the defenders. That the work was done, and taken off the hands of the contractor, was a distinction which did not affect the principle. The principle stands good, that if

his property.

CLEGHORN v. skilled workmen are employed, you are not liable for TAYLOR, &c. Liability of pro-injuries caused by the insufficiency of the work done. prietor for da-mage to the ten- cases of railway companies afforded no analogy—they were ant of an ad-either liable on contract of carriage for injury done to goods joining subject, caused by the or passengers conveyed along the line, or they were liable insufficiency of by statute for injury done in the construction of their works. 6. Railway Cases. Hobbett, 1849. The defenders referred to the English cases-Pointer and Rapson (ut supra), and Allan v. Hayworthy, 7 Adol. and Ellis, p. 974.

At advising.

LORD JUSTICE CLERK—The question of law raised on this special verdict is of the very highest importance.

The property of the defenders was, in respect of the particular matter in question, in an insecure and insufficient state, and this portion of it in consequence thereof fell and injured the pursuer's

property.

Is the proprietor liable in the damage caused by his property being in an insecure and insufficient state? On that point I entertain no doubt whatever. Responsibility attaches to every proprietor in such circumstances. It is a necessary burden which he undertakes, and is specially applicable to urban property, where the risk of danger to the adjoining property is so peculiarly imminent. That proposition was not in the abstract disputed. For enforcing such responsibility, it is not necessary to make out that the proprietor wilfully caused, or knowingly allowed his property to be put, or to remain in an insecure and insufficient state. I lay aside that finding of the jury as immaterial in the question of a proprietor's responsibility for damage arising from his property being insecure.

Then, on what ground is the owner to be here relieved from the liability to repair damage arising from his property being unsafe! He has, of course, his relief against those who caused such insufficiency, if it is not the result of tear and wear from exposure to wind

and weather.

The ground taken is that the liability is wholly on the tradesman whom he employed, and that he has no concern whatever with the insecure and unsafe manner in which work on his property is executed by the tradesmen whom he himself selects and employs. That is a proposition which is adverse to all the rules of the common law of Scotland, and for which no authority has been quoted.

I lay aside cases, such as Tuit's, as wholly inapplicable. was an elaborate review in that case of English authorities, in regard to damage done by contractors during the execution of the work which they are carrying on. I think the case did not require any such laborious reasoning. It is solved by the simple view of the facts pointed out in the course of the present argument by Lord Murray. Tait was a contractor to do the plaster work of a large

tenement under great alterations for a coach work-whether sub-Cleghorn v. contractor or not, was of no moment. The Dean of Guild had TAYLOB, &c. allotted a portion of the street for all the materials—stones, lime, prietor for da-&c.—to be used, and had directed this portion to be fenced off mage to the ten-Tait laid down outside this fence, on the street thus narrowed, a load ant of an adof his materials, and without lights. His liability was clear, and caused by the the proprietor who had provided and obtained a safe place for the insufficiency of building materials could not be lightly to the lightly to the could not be lightly to the Indeed. his property. building materials could not be liable for this act of Tait. in this, and in the English cases of the same sort, the injury was not caused by the property of the owner, but by the personal and wrongous acts of a contractor, and in the course of the execution of his work—a distinction which alters the origin and character of the In such cases the state of the proprietor's property, cominjury. pleted and in his own possession, does not cause the damage, but the separate acts and negligence or rashness of a contractor who is in the act of preparing the property to be handed over to the owner. Whether all the English cases are reconcileable with our principles, or very consistent, I need not inquire. This, at least, we see, that there is no fixed principle in that law, as, of late years, they abandon former decisions and introduce new principles. But I abstain from any examination of the English cases, being, in my opinion, inappli-

cable to the present. The verdict finds that a master slater was employed to put up the chimnev-can some weeks before. I will assume, in favour of the defenders, that he was a person of skill, although that is not found. Contractor he was not. That was a matter to be established by the verdict, if such had been the fact, and we can draw no inferences in point of fact. He was simply a tradesman, employed for this short and simple job. Some weeks after, the chimney-can being insecure, it falls, and does the damage. The owner may have his relief against the tradesman whom he employed, but he is the person who must go against the latter—not the neighbour whose property is injured by the insecure state of this can. The latter has no concern with the tradesman. The latter might not even have been found, if the interval had been greater. It might not be proveable, in a great many cases, that the work had been at the first insufficiently exe-That is a point between the owner and his tradesman. is enough for the party injured that the can fell in consequence of being in an insecure and insufficient state. That is his ground of claim. The owner is to prove the other matter in his claim of

relief against the tradesman.

Without enlarging more on a point which is free from doubt, in the opinion of the Court, I have no difficulty, on this special verdict, in finding that the pursuer is entitled to recover from the defenders.

I beg to say that I reserve my opinion as to cases of contractors generally. Probably the solution of such cases will depend on the particular facts of each case, and I am not prepared to concur in any such general proposition as that the owner is in all cases free because danger arises in the work of the contractor, still less after the work of the contractor is completed and left in the possession of the

ant of an adjoining subject, caused by the

CLEGHORN 7. OWNER. Neither must I be understood to give any opinion on the TAYLOR, &c. point, whether, if the work was originally well and securely con-liability of pro-prietor for da-structed, the owner is not liable. That point is not before us, and mage to the ten-may require great consideration.

LORD MURRAY concurred.

LORD WOOD.—I concur in the opinions which have been deinsufficiency of livered. his property.

I need not go over the facts found by the special verdict, and

upon which the question of liability is to be decided.

Several authorities, both Scotch and English, have been referred From the latter, it would seem that, at one time, in England, the proprietor, or principal party, was not relieved from liability or reparation of damage arising from the imperfect execution of work. or negligent acts in its progress, even where carried on by a contractor employed by him. But the tendency of later decisions, if not the rule fixed by them, has been, in certain cases, to attach responsibility to the employer alone. This principle was, to some extent, recognised here in the case of Richmond v. Russell, M'Nee, & Co., which, however, was peculiar in its circumstances, as I shall afterwards have occasion to notice. Still in all the cases cited of work done upon the property of the principal, in which the principal has been relieved from liability, the fact of there having been a regular contract, written or verbal, for the performance of the work, appears to have been established; and also, 1st, That the work was one of some continuance; and, 2d, That the injury done, for which damages were claimed, was caused by the wrongous act of the contractor during the progress of the work, and while, as yet, the subject, so far as the work was concerned, may be said to have been in the possession of the contractor and his servants, in order to its being carried on and completed, and under his independent control.

With this general remark, I would observe, in reference to the particular case before the Court, that, in dealing with it, there are two things to be kept in view—1st. That the injury and damage done was injury and damage to a neighbouring tenement by the insecure and insufficient manner in which the work upon that of the defenders was executed; and, 2d, What I apprehend to be a clear rule of long standing as between conterminous proprietors (requiring no reference to authorities to support it), and which, in practical operation, of course, has place chiefly in towns or within burghs, viz., that each proprietor is bound to keep his property in such a condition that it shall not be the cause of injury to his neighbour by its imperfect state. Now, it perhaps may not admit of being said absolutely that there is no case in which, where operations of some extent are to be executed upon the subject belonging to one proprietor, rendering the employment of others necessary, the proprietor, by entering into a contract for the execution of the work, will thereby (the work being always in itself lawful and proper) relieve himself from responsibility for injury caused to the adjoining property by the want of skill or neglect of the contractor or his servants while the work is carrying on. But, granting that there

may be such cases. I do not find any decision to the effect, or by CLEGHORN v. which it is involved, that the proprietor shall simply, by the employ- TAYLOR, &c. Liability of proment of a tradesman exercising the trade to which the work to be prietor for dadone belongs, be freed, even during the progress of the work, from mage to the tenhis ordinary common law obligation or duty to his neighbour, and ant of an ad-the liabilities it infers, however limited the extent of the work to be caused by the done may be. Take, for instance, such a case as the present (and insufficiency of many others of a similar nature might be put), where a tradesman his property. was employed to put up over one of the vents of the defenders' house a chimney-can with an iron turning top; for that is all that is found by the verdict of the jury. I should, on the contrary, be inclined to think that, in cases of that kind, the obligation which. by quasi contract or otherwise, the principal was undoubtedly under to the conterminous proprietor, prior to the commencement of the repairs or other work to be done on his property, remained in force even during its execution; and that, quoud hoc, the tradesman was to be considered as in the service of the party employing him. although he was not to be paid by days' wages, but at the ordinary rates chargeable for the work to be done. And, it may be observed. that that is the footing on which the employment in the present instance must be taken to have stood, it not being found that the work was engaged to be done for any positive sum, as in a proper contract.

When a proprietor, who has the power of selection, employs another to do a piece of work, it lies with him to see that it is well done; and if he takes it off the tradesman's hands, he is to be presumed to have been satisfied with its execution. If after that, damage is caused, by its having been imperfectly done, I am of opinion that. in accordance with the general obligation under which the proprietor lies to his neighbours, and with principle, the sound result is, that the party whose property has been injured should have his claim for loss against the employer the principal, leaving him to seek his relief against the tradesman he employed. Were it otherwise. were the proprietor not responsible, from the time that the work is completed (supposing that during its progress his common law obligation stood suspended), the most inconvenient, and I humbly think, unjust consequences, would ensue; for if not, then, although the loss arose a year or two, or six years afterwards, the proprietor's defence would be good, and the injured party would have to seek his reparation from the tradesman, or his representatives, who might have been employed, if they could be found, which very possibly might not be the case; and this, however trifling the piece of work done (but from the imperfection of which, as the present instance shows, great loss may have arisen), and however unsubstantial the tradesman may have been in his circumstances. I shall not stop to put the cases which might be suggested in illustration of the view which I have now stated; and I shall only add, that in my opinion the verdict ought to be entered up for the pursuer.

LORD COWAN.—The question of law raised by this verdict is of large application, and considerable practical inportance, and so far ant of an ad- In the state of the facts as found by the verdict, whatever be the his property.

CLEGHORN v. as I can see, has not, in the broad aspect presented by the defend-TAYLOR, &c. ers, been the subject of express judicial decision. The principle. Liability of pro-however, which, in common with all your Lordships, I hold, must mage to the ten-rule the case, is in itself sufficiently simple.

joining subject, whatever be the caused by the relief the defenders may be entitled to against the tradesman, they insufficiency of are directly responsible for the injury caused through the insufficiency of an erection made on their ground, and by their authority. Conterminous proprietors, especially within burgh, are under certain mutual obligations and restrictions in the exercise of their proprietory rights. To them peculiarly is applicable the rule of law. sic utere tuo ut alienum non laedas. They must use their property so as not to injure that of their neighbour by any nuisance, or by what is tantamount to it, being within their premises. not either erect insecure buildings, the fall of which may injure their neighbour, or suffer to remain on their property ruinous tenements. The fact being ascertained, that the erection has fallen from inherent defect in original formation, or from its ruinous condition through want of repairs, or otherwise, the proprietor must indemnify the party suffering from its fall. No matter although the proprietor may be ignorant of the inherent defect, he must be responsible for the consequences of its insecure condition. The right which every man has to use his property at his pleasure, will not justify the erection on it of what is inherently faulty, so as, when the erection tumbles down and causes damage, to save the owner from liability. claim for reparation, and the only one competent to the injured party. is against the owner.

There are many cases of this liability having been enforced. The cases of Douglas v. Monteith and Callender v. Eddington, in the Jury Court, in 1826, and of Chapman v. Parlane and Parlane v. Binnie, 25th February and 28th June 1825, in this Court, afford illustrations of it. So early, indeed, as February 1666, in the case Kay v. Littlejohn, reported by Stair, it was held that both fiar and liferenter were liable to repair the hurt occasioned to a neighbouring tenement by the fall of their house, caused by its ruinous condition. Inherent insufficiency in the original construction affords no less strong ground for subjecting the proprietor in the consequences caused by the fall of the erection.

The proprietor may, in certain circumstances, be free from this responsibility. It may be shown on the facts, that the erection complained of as defective, and through which defect the injury suffered, has arisen, was made, not by him, or on his authority, or under his employment, but by a third party (as tenant) in possession of the premises, under a distinct title, and making the erection for his own behoof, in the legitimate exercise of his rights as tenant. in Henderson v. Sir Michael Shaw Stewart, 23d June 1818, Hume, 522. 15 Shaw, 868 (1837), where an embankment made by the tenants of a mill, possessing under a lease of 99 years, burst, through alleged defective construction, it was not the proprietor but the tenants who were held responsible. No plea seems then ever to

have been thought of in that case, that neither was responsible, be-CLECHORN TO. cause of the dam having been made by contract. So, where the TAYLOR, &c. erection falls to be made or kept up by the landlord, he may get prietor for dafree, by establishing that the erection by which the damage has been mage to the tencaused was properly constructed, and that the fault or negligence ant of an adjoining subject,
which caused the accident was not imputable to him. Such was caused by the the case of Weston v. The Incorporation of Tuilors, 10th July 1839, insufficiency of But, except in special cases of this description, the rule which has his property. been invariably acted on from the earliest times has been, to subject the owner of the insufficiently constructed or ruinous tenement, or other erection which has tumbled down in the damage thereby suffered.

The facts found by the jury do not raise any question of this sort. viz., that while the workmen of the slater were engaged in the erection of the chimney can and iron top, their negligence or culpa caused the can or the iron top, or both, to fall, and thereby damage the pursuer's property. No case of that kind occurs for decision. The work was here completed, and given over to, and in possession of the defenders and their tenant. It thenceforward formed part of the premises erected on their property. It was their chimney can and top. The insecure and insufficient condition caused it to fall. and equally, as in the case of the fall of a ruinous tenement, the owner of the premises must make good the loss to the party injured.

It is said that the work had been completed only about a month before it fell, but this plainly cannot affect the principle of liability. It might have been as many weeks, or months, or years, as it was days before the occurrence; and the proximity of the fall to the completion of the erection only tends to support more conclusively the fact found by the jury, that the cause of its fall was the insecure

and insufficient manner in which it was put up.

The cases on which the defenders relied in their argument were, all of them, cases where the injury causing damage was committed by the workmen or servants of third parties, carrying on a distinct and independent employment, and with whom the owner or principal sought to be subjected in the damage suffered, had contracted to do the work. The fault or negligence of the servants of such parties, contractors or employers, carrying on a distinct business, was not held to charge with liability the principal or owner employing them. The contractor or employer himself, and the persons whom he employs, are not deemed to be the servants of the principal, so as to charge him with liability for their negligence or culpa. These cases appear to me to fall within quite a different category, and to have no relevant application to that state of facts to which the law has here to be applied.

As regards the English cases, the judgment in Reddie and Hobbett, 1849, proceeds upon a review of the more important of them; and Baron Rolfe, in delivering the judgment, explains their principle. Without going into these authorities, I adopt the general view taken of them by the First Division of this Court, in the well considered case of Nisbett v. Dixon, 8th July 1852. It was there remarked, his property.

CLEGHORN v. that the progress of the English law had of late been in a direction TAYLOR, &c. more in accordance with our views, and that the last case, that of Liability of proprietor for daAllan v. Hayworthy, seems to come to this, that though a Railway mage to the ten-Company, who had employed a contractor, might not be liable for ant of an adjoining subject, injury done to a passer-by, they were responsible for injury to procaused by the perty arising from careless execution of the railway works.

In that case of Nishett v. Dixon, as in the prior one of Ranken.

In that case of *Nisbett* v. *Dixon*, as in the prior one of *Ranken*, 19th March 1847, tried before the late Lord Justice-General, it was attempted, on the part of Dixon and Co., to elude responsibility for the injury caused by and through the calcining of their ironstone, upon the plea that the work was done, not by them directly, but by persons with whom they had contracted to do the work, and workmen employed by these persons. This plea was overruled, and the case comes nearer to the present than any other reported decision.

But I do not rest my opinion so much upon the principle of that case, and its applicability to the present, as under the findings of the jury, as to the character of the defender's employment of the masterslater and his workmen. In that respect there is not a little resemblance, from the absence of any distinct statement in the special verdict, that the work here truly was done by a party occupying the position of a sub-contractor, or even of one carrying on a distinct trade, and skilful in the business to execute which he was here em-For, whether sub-contractor or not, the work was done and completed, and given over to the defenders and their tenant, and they were in possession of the premises; only, sometime afterwards, it might be longer or shorter, days, months, or years, this insecure and rickety can and iron top tumbles down, and damage is done thereby to the pursuer. To no other party, as I think, can he be called upon, or even is he entitled, to look for legal redress and indemnity than to the defenders, on whose property this dangerous erection stood.

LORD JUSTICE-CLERK.—As to the £10 at the end of the verdict, it is settled law in the case of Insurance Offices, that where one of a set is destroyed in the case of articles of taste, the party is entitled to the value of the whole set. The point was settled in the case of Lord Salisbury, where two of a set of vases of service china were destroyed, and he got L.4000, being the value of the whole set.

Verdict entered for pursuer.

TARRANT v.
WEBB.
Master not liable for injuries caused by fault

18th June 1856.—TARRANT v. WEBB.—25 L. J., (Com. Pleas,) p. 261.

caused by fault of a scaffolding of fellow-ser- of fellow-ser- of fellow-ser- of fellow-ser- of the defendant. The scaffolding his best to employ competent had been erected by a servant of the defendant, and the servants.

judge, in summing up, told the jury that the defendant

would be liable if he employed incompetent persons to erect TARRANT v. WEBB. the scaffolding. It did not appear that the defendant knew Master not liahis servant to be incompetent. The jury found for plaintiff, ble for injuries damages £25. A rule nisi for a new trial was obtained, of fellow-servants, if hedoes on the ground of mis-direction, in that the mere employ-his best to emment of incompetent persons would not make defendant ploy competent liable; at all events, unless he knew of the incompetency, and the plaintiff did not.

For plaintiff, it was contended that the objection made to the summing up of the learned Judge was this. The case of Wigmore v. Jay was handed up to him and relied upon, and he ruled according to that case, that the ordinary rule as to the responsibility of a master for the negligence of a servant does not apply where the person injured is a fellow-servant. unless there be evidence that the person employed and who caused the injury was an improper person to employ for the purpose in question. But it is now contended that another proposition is to be added to the doctrine, and that in order to recover against the master, it must be shewn affirmatively by the plaintiff that the master knew that the servant employed was incompetent. That is a principle which ought not to be established. The judge told the jury, that if they thought the defendant interfered in the erecting of the scaffolding, or that the person he employed was incompetent, they should find for the plaintiff. It is contended that that was a proper direction.

JERVIS, C. J.—As to both points, it seems to me that it was necessary to add something more. As to the first, if the defendant interfered with competent skill, he would not be liable.

FOR PLAINTIFF—In the judgment in *Hutcheson* v. York, Newcastle, and Berwick Railway, Alderson B. says, "that the master is not in general responsible when he has selected persons of competent care and skill."

Jervis, C. J.—It is not that the master must warrant the competency of the person whom he employs, but that he must take care to select for the work persons who are competent.

FOR PLAINTIFF—In Skip v. Eastern Counties Railway Co., Parke B. says "the company are, indeed, bound to see that their servants are persons of proper care and skill, but that is all." In the case of Paterson v. Wallace and Co., in the House of Lords, there is no qualification of the rule laid down in Wigmore v. Jay, Lord Cranworth said, "that the law of England agreed with that of Scotland in holding that a master is bound to take all reasonable precautions for the safety of his workmen."

CRESSWELL, J.—Is not the real distinction this, that when an in-Webs. jury is done by one servant to another, the rule of respondent suremaster not ma-rior does not apply? In such case, the servant injured is bound to caused by the go further, and to show negligence in the master in order to make fault of a fell-him liable. In a case of this kind, the negligence which causes the low-servant, if he does his best wrong is that of the servant, and not that of the master; and the to employ com-question thus arises, whether there was any negligence in the master petentservants in not employing competent servants.

(The other side was not called on).

JERVIS, C. J.—I am of opinion that in this case there must be a The rule is now established that if a workman meets with an injury from the negligence of a fellow-workman, no action will ordinarily lie against the master. As J. Cresswell has put it. the superior is not responsible as between his servants, but he may be liable in case of negligence of his own. There may be a doubt as to the policy of the law, but it is now quite a settled one. Negligence may consist of more than one matter. But it cannot exist if the master does his best to employ competent persons. He cannot warrant the competency of his servants. The jury, in this case, might have been of opinion that the defendant had taken great care in the selection of the person who erected the scaffolding, and vet that he was incompetent for the work. I think, therefore, that the rule for a new trial must be made absolute.

CRESSWELL, J., and WILLIAMS, J., concurred. Rule absolute.

SHIELLS v. EDINBURGH AND GLASGOW RAILWAY CO. Company not liable for injuries caused by servants of pargoods.

4th July 1856.—WILLIAM SHIELLS, Pursuer, against The EDINBURGH AND GLASGOW RAILWAY Co., Defenders.— D. 18, p. 1199.

The pursuer was waiter in an Edinburgh hotel, and ties with whom alleged that in the afternoon, while proceeding from Leith they contract they contract Street Terrace, and crossing the street from the pavement in front of the Register Office, in Princes Street, to the 'Box.' on the opposite side, at the northern extremity of the North Bridge, he 'was violently knocked down, and ' thrown about a vard and a-half towards the middle of the ' street, by a horse and van belonging to, and the property ' of, the defenders, having the defenders' designation on the ' same, or which was licensed in name of the defenders, as ' their property. The said horse and van were, at the time. ' under the charge of, and driven by James Mackay, a ser-' vant of the defenders—at least by some one in the service ' and employment of the defenders, and for whose acts they

He suffered injuries which permanently Shiells v. Edinburgh 'are responsible.' disabled him. and raised action against the defenders for AND GLASGOW £600 damages, alleging that the injuries were received Railway Co. Company not through the carelessness of the 'servant of the defenders, liable for injuries caused by

The following issue went to trial:— Whether, on or ties with whom about the 2d day of February 1852, in Princes Street, in for delivering front of the General Parist ' front of the General Register House, Edinburgh, or near 'thereto, a horse and van belonging to the defenders did. ' through the fault of the defenders, drive down and injure 'the pursuer, to the loss, injury, and damage of the pur-'suer.' The jury, by a majority of 9 to 3, returned a verdict for the pursuer, damages £215. The defenders moved the Court for a new trial, maintaining that the verdict was contrary to evidence.—1. That the driver of the van was not their servant, nor were they responsible for him. Though the van was theirs, it was, at the time, lent to Mather, Peace, & Co., who had a contract with the defenders for delivering all parcels in Edinburgh coming by 3. Mather, Peace, & Co., provided their own their railway. horses, and their own drivers, and others who took charge of the delivery of the goods. 4. That, in April 1852, the pursuer was informed by Mather, Peace, & Co., in reply to inquiries made, that they held themselves responsible for the fault of the driver of the van, but denied that there was any fault. In these circumstances, the verdict was negatived. It was indispensable for the pursuer to prove that the horse and van were in the possession, and under the control of the defenders, as completely, at the time of the accident, as if they were their own property. admitted that a man might be responsible for a hired horse, -for example, if, while riding the horse, it had injured anv one. Liability in such a case could not depend on absolute property in the horse. But here the defenders had not hired the horse, but had only contracted with Mather, Peace, & Co., whose horse and driver were employed.

The pursuer contended that the horse and van both belonged to the defenders, in the sense of the issue, and so as to attach to the defenders liability, ad civilem effectum, for the accident.

they contract goods.

LORD PRESIDENT.—The jury have here returned a verdict in favour EDINBURGH of the pursuer, affirmative of the issue. If the issue were read lite-AND GLASCOW rally, the question is put whether the accident occurred by the horse RAILWAY Co. rally, the question is put whether the accident occurred by the horse Company not "belonging to," meaning thereby the property of the liable for inju- but the evidence is quite clear that he was not the property of the servants of par-defenders. I do not think, however, that that is truly the meaning ties with whom of the word "belonging," while, at the same time, I think the issue. using that word, indicates a certain degree of right and control over the horse in the defenders, which makes it, in the ordinary meaning and fair legal construction, to be a horse belonging to them at the For example, if they had hired that horse by the month or year, and kept it in their own stables and used it in their own van it would not be a horse belonging to them in one sense, but it would be in the sense of the issue; and I am inclined to construe the words in the issue as indicating the relative position of the parties to each other in regard to this demand. The demand is made for an injury done by the horse. The van was the property of the defenders. The horse was not the property, and the driver, strictly speaking, was not the servant of the defenders, but of Mather. Peace, & Co. The question comes to be, whether this was an injury done by a horse and van belonging to the defenders? That raises various questions, both of fact and of law, and questions where it is not very easy to separate the law and the facts. The construction of the word "belonging," and the relation of parties to each other, may be matter of law; and, at the same time, they are dependent on the particular strength and shape, and aspect of the facts, because this relation of parties, in the complicated state of society, comes to be so very shadowy in its distinction, that it may be very difficult to say sometimes whether parties do stand to each other in I cannot say that this case has been brought up to a point to satisfy us that the parties were in a position towards each other that made this horse "belong" to the defenders: and, therefore, upon the view I take of the case, I think there ought to be a new trial and investigation of the matter. I am therefore for setting aside this verdict, and granting a new trial.

LORD IVORY concurred

LORD CURRICHILL.—I am of the same opinion. Under this issue, as finally adjusted, it was competent for the pursuer to establish two things: first, that the horse and van belonged to the defenders; and, second, that it was through the fault of the defenders that the horse and van injured the pursuer. As to the first question, it is established that the horse and van did not belong to the defenders. Now, I concur in thinking that the word "belong" must be taken in a very liberal signification. I would hold that the horse belonged to the defenders, if they had hired it for a year, or even for a month; and I would go farther, and say that even if they had borrowed it for the occasion, it would have belonged to them in the sense of this But in what sense did it belong? It certainly never was their property. Did they hire this house, or was it a contract or loan? Nothing of that kind is suggested. Was the horse ever in

the possession of the defenders? That is not suggested; and how SHIELLS n. a horse not the property of a person, and never in the possession of EDINBURGH that person, can be held to belong to him, I cannot understand. RAILWAY Co. All that I say is, that the party who contracted with the defenders Company not to perform certain work, in the performance of that work did use liable for injutheir own horse, and without, in any intelligible sense, transferring the servants of that horse to the defenders, or bringing it into their possession in parties with any sense in which it could be said to belong to them; whether or whom they not this is owing to a defect in the evidence I do not know, but livering goods. there is no evidence on that point. It is quite possible that in another trial the pursuer may bring the evidence up to that point.

Then, with regard to the second question, whether the defenders were in the fault, it is not necessary to go into that. the servant of Mather, Peace, & Co., but we must consider their Suppose that Peace himself had been driving, was it through the defenders' fault that the accident occurred? In considering that question, it is a very material element to whom the horse belonged; for if Peace was the only party to whom the horse belonged, it is very difficult to see how it was through the fault of the defenders that the pursuer was injured. Here, again, perhaps the evidence in a new trial may bring out a connection between Mather, Peace, & Co., and the defenders, different from what is now in evidence. As I read that evidence, I see nothing to create a connection of master and servant between Peace and the Railway Company, so as to make the latter responsible for Peace in the character of his master. There is a connection of some sort between them, but, so far as I can see, it is not a connection of master and servant, so that the evidence does not bring up the case to either of these points.

LORD DEAS.—I entirely agree with your Lordship in the chair. and have nothing to add. I think that, construing the word "belonging" even in the broad sense your Lordship suggests, this horse did not belong to the defenders in any reasonable sense whatever; and that is quite sufficient to set aside the verdict on this issue, which is perilled on the fact that the horse and van both belonged to the defenders. This being so, I think it unnecessary to go

further.

The Court set aside the verdict in the case, and granted a new trial, reserving all question of expenses.

17th July 1856.—WILLIAM POLLOCK, Pursuer, against Wilkie. POLLOCK v. JAMES WILKIE. Defender.—18 D., p. 1311. 28 Jur., tradesman for p. 659. insufficient

The pursuer, who is proprietor of the tenement No. 32, George Street, Edinburgh, procured plans from Mr Rhind, architect, in regard to proposed alterations. The defender, POLLOCK v.
WILKIE.
Liability of
tradesman for
insufficient
work.

who is a builder in Leith, contracted to perform the work: One of the objects proposed being to lower the floors of the shops, it became necessary to underfoot the walls; and the defender was employed to do the work which was additional, and did not form part of the contract.

In the course of the operations some damage was caused to the upper flats and the adjacent properties, which the pursuer paid, and he now brought this action of relief against the defender, averring that the damage had been caused entirely by the reckless and unskilful manner in which the defender had executed the said underfooting.

The defender did not deny that the damage had resulted from the mode in which the underfooting had been executed, but he contended that, in regard to this part of the work, he had merely obeyed the directions of the architect, and was not therefore liable.

A proof was led in the Inferior Court, and the result is stated in an interlocutor by the Sheriff-substitute (Arkley) in which he

'Finds it proved, that the underfooting in question was 'executed by the defender in an unskilful and improper 'manner, and that the damage to the buildings above was 'caused by the said work being so executed: Therefore de'cerns against the defender in terms of the conclusions of the 'libel. Finds the pursuer entitled to expenses, &c.

' Note.—The Sheriff-substitute has carefully considered the whole-'evidence in this case with an anxious desire to give the defender the-'benefit of any reasonable doubt he might find as to the cause of 'the damage done to the upper buildings; but he is shut up to the 'conclusion, that the damage arose from the improper way in which 'the defender executed the underfooting. Several matters argued on 'behalf of the defender at the debate have no bearing on the real 'question here at issue. For instance, the Sheriff-substitute pays no attention to the point, whether a Dean of Guild's warrant was ob-'tained for this underfooting or not. If this were a question between the pursuer and the public, that might be of importance; but it is 'of none between the pursuer and the defender. Nor is it of much 'consequence when the defender was first instructed to execute the ' underfooting, unless it could be shewn that the damage was caused 'by his getting the instructions too late. It certainly appears singular, that the whole work necessary to be done was not at first ex-' plained to the defender, and that he was allowed to make consider-'able excavations before he seems to have known that any underfoot'ing would be requisite. But the evidence adduced would not justify Pollock v. the Sheriff-substitute in holding that this was the cause of the da-Liability of mage. The true causes appear to have been the use of improper tradesman for 'materials, the small extent in breadth to which the underfooting was insufficient 'carried, and the removal of too much earth from beneath the walls work. 'at a time. Almost all the witnesses agree in attributing the work 'to these causes. In fact, the defender cannot deny that the work 'was unskilfully and improperly executed; and accordingly he is driven to rely on the defence, that even although it was so, it was done under the eye and according to the instructions of the archi-'tect or his clerk. The onus of proving this defence rests on the 'defender: and the Sheriff-substitute cannot hold it as made out in 'the face of the very positive and distinct testimony of Mr. Rhind 'and Mr. Leadbetter. Their evidence cannot be set aside by various of the workmen who were employed on the job declaring that they 'never heard any remonstrances from these centlemen as to the way 'in which the operations were carried on. The remonstrances would be addressed to the defender, and not to his workmen.

'The Sheriff-substitute may further observe that, generally the witnesses concur in opinion that the soil was well enough adapted for the process of underfooting, and that the work could have been

'safely executed if due care and skill had been exercised.'

The interlocutor was affirmed by the Sheriff: and the defender advocated, pleading that he was merely the hand employed by the architect to execute the work; that if the mode in which he did it was not the proper mode, he ought to have been told so; and that if damage ensued, the parties who ought to have directed him were His interest was to use rubble, and if that was not the proper material, the architect or clerk of the works should have directed In point of fact, after the damage had been sushim to alter it. tained, he was directed to alter, and did alter it. In the circumstances, the responsibility did not rest upon him. The counsel for the pursuer were not called on.

LORD JUSTICE-CLERK.—The defence here is, not that the defender did not do wrong, but that the pursuer saw him doing wrong, and did not dismiss him. This man was a builder, and agreed to do the work. We cannot listen to this. The other judges concurred.

The Court pronounced the following Interlocutor:

'Advocate the cause.—Find it proved, that the underfooting in question was executed by the defender in an unskilful and improper 'manner, and that the damage to the buildings above was caused by 'the said work being so executed: Therefore decern against the de-'fender, in terms of the conclusions of the libel, &c.'

WILKIE.

CALEDONIAN RAILWAY Co. Maybelawfully in a train without a ticket

HAMELTON v. 10th July 1856.—THOMAS HAMILTON against THE CALE-DONIAN RAILWAY Co.-D. 19, p. 457. Jur. 29, p. 456.

> The pursuer, while travelling on the Railway, was injured The defenders admitted liability, provided the pursuer could be held to have been a passenger in the train, in the meaning of the Company's acts and bye-laws, he not having had a ticket, and having travelled beyond the station to which he at first expressed his intention to proceed. It appeared that the pursuer, who was extensively engaged with brick works at various parts of the line, had been in the practice of coming out at various stations, and afterwards proceeding with different trains; and he had paid extra fare on his return. Such he alleged was his position on the occasion of the injury. The Court held that he was not in the train without a ticket feloniously or fraudulently. with the intention of not paying the value; and the jury having returned a verdict for L230 of damages, the Court sustained the verdict.

v. CALEDONIAN RAILWAY Co. Damages not recoverable where there is fault on both parties directly contributing to the injury.

M'NAUGHTON 15th January 1857.—Jane Bowman or M'Naughton, Pursuer, against THE CALEDONIAN RAILWAY COMPANY, Defenders.—D. 19, p. 271, and 21, p. 160. p. 132, and 31, p. 94.

> The pursuer's husband was a joiner, in the employment of the Railway Company, and was killed in February 1855 near Greenock, in consequence, as averred, of the neglect of an engineer and stoker, also in the employment of the defenders.

The defenders pled, inter alia, that the allegation of injury, occasioned through the culpability of fellow-servants in the defenders' employment, was irrelevant as against them, the defenders not being legally responsible in a question with the husband's representatives for such culpability. The Lord Ordinary (Ardmillan) repelled the plea. In a note, he stated that-

'The plea raised a question of great general importance, entering

deeply into the constitution of one of our most common and familiar Manghton contracts. The facts alleged by the pursuer, and to be assumed at contracts. The facts alleged by the pursuer, and to be assumed at contracts. The facts alleged by the pursuer, and to be assumed at contracts. The facts alleged by the pursuer, and to be assumed at contracts of carpenter in repairing a railway carriage in a siding, was killed by recoverable a collision, caused by an engine driving violently into the siding, where there is fault on both to warning was given, and no precautions were taken to secure the parties directly safety of those who might be engaged on the siding. The collision contributing to and consequent injury and death of Manghton are alleged to have

' and consequent injury and death of M'Naughton are alleged to have the injury. ' been caused by the fault of the defenders' servants, viz., the persons ' in charge of the engine, and the person who arranged the switches. 'The defenders plead, that the averments are not relevant to infer ' their liability, in respect that M'Naughton was in their employment 'at the time of the collision, and that for injury by one servant to 'another the common master is not responsible.' His Lordship entered into an examination of the principles of the law of responsibility. holding the primary principle to be culpa tenet suos auctores; but still that actual fault was not necessary to the responsibility as auctor. as a man may be auctor without being personally actor of the wrong-Qui facit per alium facit per se—and that there was an implied mandate by a master to a servant, for doing all acts within his proper That it was settled by many decisions, that a master is responsible to a stranger for the fault of his servant, committed within the scope of his employment. But it being said that a master is not liable for injury done by one servant to another—and some important English authorities were referred to, which his Lordship carefully examined and contrasted with the Scotch decisions—the result was, that so far as he could venture to form an opinion on the English decisions, he was disposed to think that no rule quite so absolute and inflexible as that for which the defenders contended had been settled by express decision, although certainly the authority of the cases, and the dicta of the Judges were favourable to the defenders' plea. As to the law of Scotland, the decisions were chiefly His Lordship proceeds:—' It is true that the adverse to the plea. contract of service, and the responsibility of masters for the acts of servants, ought not to be governed by peculiarities of local law, and that the principles, when fully ascertained and judicially recognised, ought to be of general application. There may, perhaps, be found some standard of responsibility—intermediate between an inflexible rule enforcing the master's liability in all cases where one servant is injured by the fault of another, and an inflexible rule, exempting the master from liability in all such cases; and it were most expedient, that if there be such a standard, it should be authoritatively declared and enforced throughout the United

The case, for instance, might occur, of injury to one servant by the fault of another, while both are employed in a common operation—as two men sawing at one plank, or felling one tree; or working together as colliers at one place, and in one department, when, by the carelessness of one the other is injured. There is no warranty of absolute security implied in the contract of service; and if

parties directly

M'Naverton several men in one employment, engaged together in one common * CALEDONIAN operation. mutually relying on one another, there may be good RAILWAY Co.

Damages not grounds for adopting the rule of the English law, which exempts the master from responsibility to one of their servants for the fault where there is or carelessness of another, fault on both

On the other hand, cases may occur of a different character, where contributing to other elements arise, which must enter into the question of liability. It may be that the persons, though servants of the same master, stand in regard to each other in the relation of superior and subor-Both are, indeed, servants, but they are not on the same level, for superintendence is entrusted to the one, and in superintending he is doing the duty and acting as the representative of the mas-In such a case the Lord Ordinary is of opinion, that for the fault of the servant having such superintendence the master is and ought to be responsible; and in the case of Paterson v. Wallace, in the House of Lords, the master's liability, where there is blame on the part of a servant charged with direction or superintendence, was recognised.

> Then again, it may be that the two persons, viz., the wrong-doer and the injured, though both at the time servants of the master, are engaged in different operations, and in distinct departments of work -a dairymaid is bringing home milk from the farm, and is carelessly driven over by the coachman—a painter or slater is engaged at his work on the top of a high ladder, placed against the side of a country house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder, and upsets it—a clerk in a shipping-office is sent on board a sloop belonging to the Company with a message to the Captain, and he meets with injury by falling through a hatchway, which the mate has carelessly left unfastened, though apparently closed—a ploughman is at work upon a piece of ground held by a Railway Company, and adjacent to the Railway, and is, while in the employment of the Company, killed by an engine, which, through the rashness or carelessness of the engine-driver. leaps from the line of rails into the field. Many similar illustrations of injury to one servant by the fault of another, in a separate and distinct department, suggest themselves. If the absolute rule maintained by the defenders is well-founded, the master would in all these cases be exempt from responsibility,—a very startling resultto a Scotch lawyer; for whatever support to such a rule may be found in some of the decisions of the Courts, and more particularly in some of the dicta of the Judges in England, there is neither precedent nor authority in the law of Scotland in favour of it.

In the present case the carpenter had nothing to do with the locomotive department of the Railway business; he was engaged in his own separate work, in a place where he was entitled to expect safety. It was the duty of the defenders to take all the proper precautions The locomotive business was in the hands of the defor his safety. fenders or their servants in that department; not to any extent in the hands of the carpenter. It was surely the duty of the defenders so to work the locomotives as not to run them into what was for the

time the carpenter's shop; and if it was their duty to secure his M'NAUGHTON safety by their caution, then those who conducted the locomotives v. Calebonian were doing their work in a department with which the carpenter had Damages not nothing to do; and for fault in the doing of that work they, and not recoverable the carpenter, must be responsible. On the whole matter, the Lord where there is Ordinary—though disposed to qualify his judgment, by reserving for parties directly serious consideration the propriety of adopting the English rule to a contributing to limited extent, and in a limited class of cases—is of opinion that, in the injury. this case of injury by the fault of a servant in a separate and distinct department, the plea of the defenders against the relevancy ought not

The defenders reclaimed, contending that the English law was the proper one; and it was stated that the rule had since been recognised as the correct principle by the Supreme Court of the State of Massachusetts.

to be sustained.

LORD JUSTICE-CLERK (Hope). - I would guard myself against adopting all the Lord Ordinary's note. I go on the broad principle that, since the employer is liable to third parties for the injuries sustained by them, he is a fortiori liable for those sustained by his own ser-The defenders say the general policy of the law is otherwise. I do not agree with that. I consider the safety of that large class of men coming under the designation of fellow-workmen ought to be attended to. The notion that each workman undertakes all the risks of accidents caused by say 1000 other fellow-workmen employed on a railway, and that the master is not to be liable, is to my mind quite opposite to reason and justice. The question is. What is really in the contract of service? and I cannot help thinking that we cannot imply in it an exclusion of the right of protec-The duty of the employer is to take care tion to life and person. not to allow his servants to injure any one. That is a general duty, and it is not limited merely to the public. If he is liable for injury to the public, why should he not also be liable for injuries done to one of his own servants, even although such injury should arise by a fellow-servant's neglect or disobedience of orders? The first thing is, I think, to take care of all his own servants; they are brought into constant contact with one another, and the risk of injury is very great. The order and duty, therefore, of being careful and attentive to the life and person of others, applies first and primarily to fellow-servants. Well, if the instructions given clearly apply to the preservation of fellow-servants, their disobedience to them renders the party liable. As to the English cases on this point, if they had declared a master not liable wherever his instructions had been violated, I could have understood it; but that is not said, for he is liable in England in case of injuries to the public, and why he should not be liable for the injuries done to fellow-servants, I cannot ima-We are told that workmen will be better cared for by giving them actions of damages against their fellow-workmen-persons from whom, in general, nothing can ever be recovered. I am sure, if we introduce this principle into railways, there would be a most dangerous laxity, and extreme want of care. If the highest Scotch

where there is authority. fault on both the injury.

M'NAUGHTON

F. CALEDONIAN COUrt, the House of Lords, shall declare that we have misunderstood Damages not the law, or rather declare that it should be altered, we must bow to

LORD MURRAY.—I go entirely on the facts which are here alleged. parties directly The question is, whether in these circumstances the master is liablecontributing to and according to all our principles, I have no doubt he is—and therefore this action is relevant, and the pursuers are entitled to maintain it on the allegations they have made.

> LORD COWAN.—The defenders' plea, it is not contended, is applicable to the special circumstances of this case, as distinguishing it from others of the same class. It is, in terms, the very plea urged in the case of Gray and Brassy, and is, in the words of Lord Fullerton in that case, 'general, absolute, and unqualified.' question been an open one in principle, it would have required serious discussion and deliberate consideration, and I would not have been content with merely hearing the opening counsel for the But this is not the first time the point has occurred, or that the general question of a master's liability for injury done by one servant to another has been before us. There are two, if not three, decisions standing, in which the defence has been repelled by well-considered judgments of this Court. It would be wrong in this state of matters, as it appears to me, to entertain serious argument on a principle so thoroughly recognised, until the House of Lords has instructed us to act differently. It may be very expedient that the same rule should prevail in both countries, but so long as the decisions in our Court stand unreversed. I do not see how we can do otherwise than affirm the interlocutor of Lord Ardmillan.

The Court adhered.

The following issue in the case was sent to trial:

It being also admitted that the said Daniel M'Naughton died on 19th February, 1856, in consequence of injuries received by him on 15th of said month, while engaged in the service of said defenders-

Whether the death of the said Daniel M'Naughton occurred through the fault of the defenders, to the loss and damage of the pursuer. At the trial the Lord Justice Clerk directed the jury to return answers to the following questions, viz. (1.) Whether this death was caused by the fault of the defenders. (2.) Whether it was caused by the fault of the deceased—or, (3.) Whether it was caused partly by the fault of the defenders, and partly by that of the deceased.

The jury returned this verdict,—'Find that the death of ' Daniel M'Naughton was not caused by any fault of Gilchrist

' the engine-driver, and farther find that the death was caused M'NAUGHTON partly by the fault of the deceased himself, and partly by RAILWAY CO. The fault of the Company, and they leave the court, as a Damages not recoverable question of law, to enter up the verdict for the pursuer where there is fault on both or defenders, according as the court shall be of opinion parties directly that the facts specially found warrant a verdict for the contributing to

' pursuer or defenders, and in the event of the verdict being

'entered up for the pursuers, they assess the damages at

'£200 for Mrs. M'Naughton, and £100 to each of the two 'children'

Both parties claimed the verdict. The pursuers maintained that there was no sound principle on which the defenders There was fault on both sides, and could escape liability. it was unjust that the whole suffering and loss should press Two parties, to whom the injury of a on one side only. third was attributable, were bound to contribute rateably to That was an analogous case, and the result was. not that the defenders should be subjected to half the damages, but that the damages should be modified according to the discretion of the jury. The case of a collision at sea was also somewhat analogous. There each vessel bore a rateable share of the loss, calculated in a particular way. Negligence on the part of a deceased party, which was not of a gross character, did not exempt the party from responsibility through whose fault the death occurred. to the English law, a plaintiff, although guilty of negligence contributing to the accident by which he was injured, was entitled to damages, unless the jury also found that but for his negligence he would not have suffered from that of the defendant.

The defenders argued that the verdict negatived the issue. The pursuer's case on the record was that the death was caused entirely by the fault of the defenders. They perilled their case on that averment, and so framed the issue. The jury having found that it was not entirely through the defender's fault, but partly through the fault of the deceased, the issue was negatived, and the verdict was for the defenders. The rule of the English law was quite fixed, that damages could not be recovered in respect of an injury to the person, where the fault of the party injured or killed

m had been contributory to the result. The same was also AN the rule of the law of Scotland.

t At advising on 17th December, 1858, (D. 21, p. 160, e is 31 Jur., p. 94).

LORD JUSTICE-CLERK (Inglis).—All that the Court have before them, or can competently look at, in deciding the present question, are the issue and verdict. Taking the facts admitted in the preface to the issue, and those found by the verdict, the case is shortly this:—The pursuers are the widow and children of the late Daniel M'Naughton, carpenter in Greenock, who died on the 19th February 1855, in consequence of injuries received on the 15th of the same month, while engaged in the service of the Caledonian Railway Company, defenders. His death, in the words of the verdict, was caused partly by the fault of the deceased himself, and partly by the fault of the Company.

On these facts the question is, whether the Company can be made liable to the widow and children of the deceased in damages for the loss sustained by them by reason of his death.

It was strongly urged, on the part of the pursuer, that this question is settled in the law of Scotland in favour of the claim of damages. I confess I was startled by this contention, for to me the proposition was entirely new, and I had an impression, which has since been confirmed, that the authorities in our law, so far as they go, are rather adverse to such a claim. But before dealing with the authorities on either side, it is desirable, in a question of such general application, to consider the principles upon which any sound decision must rest.

If two persons, not related to one another in any special way, by their joint act or joint neglect, produce an explosion or other catastrophe, which inflicts bodily injuries on both, it can hardly admit of doubt that these two persons cannot recover, as against one another, in actions of damages. And the reason is apparent—viz, because they are both to blame for what has happened. It does not appear to me that it can make any difference in the case, that the accident or calamity has been brought about, not by their joint act or omission, but by the concurrence of two separate faults, of one of which each of them has been guilty.

The case may be varied, too, without altering the principle, by supposing that the injury sustained by each is not of the same character—for example, that one is injured in his person, and the other in his property, by the same accident, produced partly by the faul of one, and partly by the fault of the other.

Neither will it introduce any disturbing element, or prevent the application of the same principle, though the parties stand to or another in a particular relation, as principal and agent, contract and sub-contractor, master and servant, or the like. The exister of such a relation leads one, of course, to a consideration of reciprocal duties and obligations which it imposes, and this may

a most material consideration in determining where the fault lies. M'NAUGHTON and whether there is fault on each side contributing to the accident. v. CALEDONIAN But when, after full effect is given to such consideration, the fault Damages not is once fixed, the character of the relation becomes immaterial.

RAILWAY CO. recoverable

Can it be urged that where the injury is greater on one side than where there is the other. or where it is all on one side, there ought to be room for parties directly a claim of damages, so as to equalise the loss? We had an argu-contributing to ment of this kind addressed to us, plainly derived from a rule of the the injury. maritime law of Europe, in regard to the collision of ships—a rule peculiar to that system, based on a view of commercial expediency and equity not easily applied to any other case, and quite inapplicable to claims like the present; for while it was said to be very hard that the deceased and his family should bear all the loss, both he and the Company being in fault in bringing about his death, it was not proposed to divide the loss, as in the case of collision, where The pursuer's counsel there is fault imputable to both vessels. saw clearly enough that such an argument, pursued to its legitimate results, would have been fatal to him, because no such case could be raised under this issue: and therefore, he wisely contented himself with suggesting it, instead of urging and illustrating it, as it well deserved to be, if it had been at all applicable.

I arrive, then, without any serious difficulty in principle, at the conclusion that, where an event is brought about directly by the culpa of two persons, whether joint or several, where the culpa of each has contributed to produce the event, and the event would not have been produced but for the culpa of both, there can be no claim as between these persons for reparation of injury flowing from that event.

The question has been represented as new in our law, and I have therefore thought it right to examine the principles with reference to which it must be decided. But though it may never have been raised for decision in so pure a shape as here, I cannot regard it as altogether new.

In M'Neil v. Wallace & Co., a collier pursued his master for damages for injuries sustained by the fall of the roof of the mine in which he was working. It was the duty of the master to furnish wood to the workman to enable him to prop up the roof, and there was a failure in his duty-wood not being supplied with sufficient punctuality. The workman, on the other hand, knew that to work the mine without propping the roof, was attended with the greatest danger, and yet he continued to work with the roof in that state. The roof fell, and he was crushed. The Court held that he could not recover damages against his master for these injuries, because both parties were in fault, and each by his separate fault had contributed to produce the disaster, and the ground of judgment is thus shortly and clearly stated by Lord Wood. 'If the question were, 'whether the masters failed in their duty, I think it must be held 'that they did. But the failure in duty on the part of the pursuer 'was such as to bar him from claiming damages for the injury he 'sustained. We do not by this trench on the former decisions which

where there is fault on both

M'NAUGHTON ' lay down the duties of masters, and the obligation which rests upo v. CALEDONIAN them of providing sufficient machinery; but when we look to the RAILWAY Co. relative duties of the parties, it is clear that there was a failure or Damages not 'relative duties of the parties, it is often the conversable 'the part of the workman as well as of the employer.'

In a very similar case, Paterson v. Wallace and Co., where the parties directly question turned on the propriety and competency of the presiding contributing to judge taking the case from the jury, the Lord Chancellor (Cranworth), in the course of his observations, said-"Now, in order to ' recover damages, the family must establish two propositions: First of all, they must show that the stone was in a dangerous position. 'owing to the negligence of the master, and next that the workman_ 'whose life was forfeited, lost it by reason of that negligence, and 'not by reason of rashness in his own part. It is said that, by the ' law of Scotland, the master is bound to provide against the rash-'ness of his workmen; and I see in one of the learned judges' opi-' nion an expression which might give countenance to such a notion, 'but, with great deference to that learned judge, I apprehend the ' proposition is one which, as matter of law, can never be sustained."

After these cases, it is impossible to entertain the statement of the pursuer's counsel, either that the question is entirely new, or still less that the principle which I have endeavoured to enunciate is inconsistent with the authorities of the Scotch law.

His Lordship referred to the older cases where the plea had not arisen, probably from the fact that the circumstances may not have warranted the plea; he also referred to the directions said to have been given by Lord President Boyle in Whitelaw v. Moffat, and was of opinion that the direction had not been correctly preserved, but if it was he could not agree with it.

Considering (said his Lordship) the importance of the principles involved in this case, and the state of our authorities, it is very satisfactory to me to find that the opinion I have formed on a consideration of these principles, is in accordance with the rule which prevails in England. It is said that the cases cited are all nisi prius But it does not appear to me that they lose any of their authority from that circumstance, for when you have a question determined by a series of rulings at nisi prius, by such judges as Lord Tenterden, Baron Alderson, and the present Chief Baron, without any of these rulings having been brought before a Court of Error. you have the strongest evidence of a fixed and settled opinion and practise both on the bench and at the bar.

His Lordship, however, showed that the question had been settled by a full Court in England, and referred to Clayards v. Dethick, 4 Q. B. 449, and by the common law courts, and was of opinion that the verdict should be entered for the defenders.

LORD WOOD.—Now, as to the matter of law, it certainly cannot be said that, because the party injured has been guilty of some fault or negligence, he cannot recover. It is not sufficient to disentitle to damages that there has been fault on his part, that he has been doing something which strictly he ought not to have done, and without which having been done the injury would not have occurred.

The fault must be such as to have directly conduced to the injury M'NAUGHTON suffered, and not merely remotely connected with it; for in that v. CALEDONIAN case it is not to be considered as contributing to the injury within Damages not the principle that fault or negligence on the part of the individual recoverable injured shall afford a good answer to a claim by him for damages where there is fault on both against a defender who has also been guilty of fault or negligence. parties directly The fault by the injured party, when only remotely connected with contributing to the accident, is to be, as it were, discounted from the case, legal view, it, in the question of the abstract right to damages, forms no part of the case—the negligence of the defenders alone being held to have caused the injury—whatever weight it may be entitled to in assessing the amount of the damages. But, on the other hand, if, while there was fault on the part of the defenders, directly conducing to or causing the injury, there was, at the same time, fault on the part of the individual injured, by rashness or want of the care which he was bound to exercise; or in any other way which also directly contributed to the injury, then damages cannot be recovered by him. This, although there may be little express authority upon the subject. I conceive to be the law of Scotland in questions of the kind here at issue; and, without noticing specially the cases which your Lordship has already referred to, I shall only say that it appears to me that, although objections may be suggested to it—plausible enough at first sight—it is founded, as has been satisfactorily explained by your Lordship, on a principle perfectly just in itself, and which is of equal application, where, by mutual faults of two parties, personal injury has been caused to each—when it is sufficiently obvious no claim of damages could lie by the one against the other, or in the case of the collision of carriages, caused by the fault of those in the management of each, and injury either to one only or to both; or in the case where, there being mutual fault in two individuals, it has resulted only in personal injury to one of them.

With the exception of the case of Whitelaw, (as to which afterwards). I find in none of the cases relied on by the pursuers anything at all opposed, but quite the reverse, to the law, as I have Those of parties sustaining injury by falling into an unfenced pit, or the like, do not militate against it. The first duty there is the fencing by the proprietor or tenant, so that by the protection thereby afforded, accidents by the negligence of others shall be prevented. Such negligence, by having strayed from the proper road or otherwise, is therefore, in the eyes of law, immaterial, being considered to be too remote to be held to be a cause contributing to the injury, and by which the pursuer is to be precluded from ob-Other cases, although they may seemingly countaining damages. tenance the idea that, even where the fault by the injured party has been of a more positive kind, the recovery of damages is not thereby excluded, will, I apprehend, be found to be all susceptible of a similar explanation, when the character of the fault is duly attended to.

But then there is the case of Whitelaw v. Moffat (27th November 1849), in which the law, as reported to have been laid down by M'NAUGHTON the Lord President, may admit of observation in favour of the puroc. Caledonian suer's plea; and, undoubtedly, anything falling from that most able Railway Co. Damages not precoverable where there is fault on both parties directly been under the consideration of the Court; and it is obvious that a contributing to very slight difference in the wording might materially affect it, as the injury.

M'NAUGHTON the Lord President, may admit of observation in favour of the pursuer's plea; and, undoubtedly, anything falling from that most able greatest deference. At the same recoverable where there is fault on both perties directly been under the consideration of the Court; and it is obvious that a contributing to very slight difference in the wording might materially affect it, as affording any authority in support of the pursuer's view of the law.

But further, and taking it as it stands in the report, I think it can hardly be said to require the very broad construction put upon it by the pursuers. I have already observed that it is not every neglect or fault by the injured party that will prevent the recovery of damages, nor does such a result necessarily follow, even although, without the fault of the injured party, the accident would not have happened. It might be so, and yet the defenders might be responsible in damages, because the fault may nevertheless not be such in its character as to form a cause contributing to the injury.

Now it might be that it was with reference to fault of that description by the injured party that the law was laid down as reported in Whitelaw's case, and not with any intention of stating it as a proposition of wider scope, comprehending cases of the nature to which the pursuer's would apply. I venture to consider this to be the correct view of it, and the more so, having regard to the fact that the case was one in which the fault of the defenders was the having defective machinery at their work, which, in stating the law, his Lordship said they were bound to have had sufficient, evidently, as it seems to me, dealing with that as the fault, which, if proved, was to be taken as the cause of the injury, notwithstanding the fault alleged to have been committed by the pursuer.

With regard to the law of England, it appears, from the numerous decisions that were cited, to be laid down and settled by the concurrent authority of many of the learned judges, and while, if differing from our own, it could afford no absolute rule for us, it is satisfactory to find that it coincides with the view I have taken of what I conceive to be the law of Scotland.

LORD COWAN.—It appears to me that where the fault of the deceased has essentially or directly contributed to the accident that led to his death, and that I hold to be the *import* of the verdict, damages are not recoverable from another party who may also have been in fault, and partly contributed to the injury or death. The authorities referred to by your Lordship satisfactorily show that this doctrine is consistent not less with the law of Scotland than with the law of England, where it appears to be firmly established. The rule, moreover, seems to me to depend on sound reasoning and clear grounds; but to go at length into this part of the case would be to repeat what your Lordships and Lord Wood have already gone fully over.

I concur in the opinion that the verdict must be entered up for the defenders.

The Court entered up the verdict for the defenders, and assoilzied.

In the subsequent action of damages between the CLYDE THE CLYDE SHIPPING Co., SHIPPING Co., and the GLASGOW AND LONDONDERRY v. THE GLAS-STEAM PACKET Co., 3d June 1859 (Jur. 31, p. 496, D. GOW AND LON-DONDERRY 21. p. 898), the Lord Justice-Clerk and Lords Wood and STEAM PACKET

Co.,
Cowan referred to the case of M'Naughton as follows:— as referring to
N'Naughton's
case—damages
LORD JUSTICE-CLERK.—We have had the authority of the recent not recoverable case of M'Naughton very strongly pressed on us by the defenders, where there is Now it appears to me that no case could better illustrate the grounds parties directly on which I propose that our present judgment shall proceed. The contributing to decision there was that, though injury has been sustained by a work-the injury. man through fault for which his employer is responsible, the employer will yet not be liable in damages if the workman's own fault contributed directly to bring about the injury. Some of the Court were of opinion that the injury, being found to be caused partly by the fault of the defender, and partly also by the fault of the pursuer, the verdict was not within the issue, which charged that it was caused by "the fault of the defender." There was no judgment to this effect, but it appears to me that the opinion expressed may well be supported on the very same grounds, on which I have proceeded

in expressing my opinion here.

One observation which I made in that case has been misunderstood. It occurs in this portion of my opinion—'Can it be urged ' that where the injury is greater on one side than the other, or where 'it is all on one side, there ought to be room for a claim of damages 'so to equalise the loss? We had an argument of this kind addressed 'to us, plainly derived from a rule of the maritime law of Europe in ' regard to the collision of ships—a rule peculiar to that system, based on a view of commercial expediency and equity, not easily applied to any other case, and quite inapplicable to claims like the present; ' for, while it was said to be very hard that the deceased and his family 'should bear all the loss, both he and the company being in fault in bringing about his death, it was not proposed to divide the loss as in the case of collision where there is fault imputable to both vessels. 'The pursuer's counsel saw clearly enough that such an argument, pursued to its legitimate results, would have been fatal to him, because no such case could be raised under this issue; and, therefore, 'he wisely contented himself with suggesting it, instead of urging and 'illustrating it, as it well deserved to be, if it had been at all appli-'cable.' Now, the case which I said could not be raised under the issue, was not a division of loss, as in the collision of ships, but that which the pursuer did suggest in argument, viz., that any loss sustained by the defenders should be deducted from the loss sustained by the pursuers, and that the pursuers should be entitled to the balance. I certainly did not intend to give any countenance to such a claim in law, but I said that such a claim (and not a claim for a division of loss), if it could be maintained in law, must be raised under a different issue. These observations were made only in the way of illustration, and were not intended to have any such general application as was supposed by the defenders' counsel.

LORD WOOD-M'Naughton's case.—Some observations made by Shipping Co., me in which, with regard to the construction of the issue, were re-The Glassier in which, with regard to the construction of the issue, were regowand Lox-ferred to by the defenders—was an action of assythment, and for re-DONDERRY covery of damages from the defenders at the instance of the widow

the injury.

STEAM PACKET and children of a deceased party; and the issue sent to the jury was Co., "Whether the deceased's death occurred through the fault of the de-M'Naughton's fenders?" According to the law of such a case, it is not one in which, case—damages if the death arises from mutual fault, the legal consequence is a divinot recoverable where there is sion of the loss occasioned by the death. If there be fault on the part of the deceased, or on the part of a pursuer who has suffered contributing to personal injury, which does not go the length of having contributed to the death or injury, that may be for the consideration of the jury in assessing the damages; but still the proper verdict there is one for the pursuer, finding the damages to the extent to which the jury shall consider him entitled to recover. If again there is fault of that amount which can be taken into account as a cause of contributing to the death, the effect of it is to wholly disentitle the pursuer to damages. It is negative to the claim, and hence when the pursuer, in such a case as M'Naughton's, takes an issue in the terms which I have already quoted, he must, as it appeared to me, when I gave the opinion referred to, be understood to undertake (and the issue must be so construed) to prove that the death occurred through the fault of the defenders' alone; so that any verdict which came short of that was to be held not as affirmative but negative of the I see no reason for changing the views I then entertained, applying them, of course, to the description of case which I was then considering, and not extending them beyond it.

> But the case of a collision of vessels and action raised by the owners of the vessel thereby destroyed or injured for recovery of the

loss sustained, stands in a different position.

LORD COWAN.—There is nothing in the case of M'Naughton which runs counter to this view of the law and practice. The issue there related to the cause of death, and the legal principle was held to be clear, that if the deceased contributed to it by his own fault, no damages could be given. Any observations which fell from the Court must be construed secundum subjectam materiam. So read, they admit of easy and satisfactory solution.

Morris THE MONK-LAND RAILWAY

31st Jan. 1857.—George Morris, Pursuer, v. the Monk-LAND RAILWAY Co., Defenders.—D. 19, p. 360.

Co. Relevancy of statement to

A fireman of a locomotive engine belonging to the destatement to infer liability. fenders brought an action of damages against his employer's on the ground that while sitting on the pushing-frame of his engine in the execution of his duty, sprinkling sand on the rails, the engine came in contact with a quantity of rubbish on the line, whereby his leg was broken. That the Morriss of accident occurred in a dark morning in February, when he LAND RAILWAY CO. CO. CO. CO. It was unprotected by a ditch or dyke. It was further statements to alleged that obstruction to the line at the place had previously occurred, and the defenders knew of this, but did not adopt proper or ordinary means or precautions to prevent it. The action held relevant, and the following issue allowed.

'Whether, while the pursuer was employed as aforesaid, on said locomotive, on the morning of that day, at a part of the defender's line of railway between Kerse Mains and the bridge which crosses the turnpike road to the west of a place known as the 'snab,' one of the pursuer's legs was broken through the fault of the defenders, by coming in contact with a quantity of blaize, or other substance, which had fallen on the line, and to the loss, injury and damage of the pursuer.'

7th Feb. 1857.—LYNCH v. HAGGART.—19 D., p. 399-593.

LYNCH v.
HAGGART.
Relevancy of
statements as
to insufficiency
of machinery.

The pursuer was a labourer in the employment of the statements as defender, a builder, in Dundee. On 6th August 1855, he of machinery. had been at work on a scaffolding in front of a house in course of building, at the height of 35 feet. The scaffolding was composed of one plank, about a foot in breadth and four inches in thickness. It was supported by three ropes. attached, one at each end and one in the middle. There were two guy ropes attached to it, intended to steady the scaffolding, and keep it close to the wall. He averred that there was only one ground plank, seven inches broad, and about two inches thick, in place of two, which ought to have been the case, and that the guy ropes were rotten. The scaffolding was further defective, as it wanted an outward railingand which was supplied immediately after the accident. These deficiencies were pointed out to the defender's manager, David Matthew, on the 4th of August 1855, but he failed to remedy the defects. At the time of the accident the pursuer and three others got upon the scaffold by means

LYNCH v. HAGGART. Relevancy of statements as

of an outside ladder. In addition to the three men, there were only two pails of water on the scaffold. Shortly after statements as to insufficiency commencing work the ground plank suddenly started up of machinery. the stones fell off—the ropes gave way, and the scaffolding fell, causing injuries to the pursuer. David Matthew, who was on the scaffolding, was killed on the spot.

> The defender pled that the statements were irrelevant as against him, as the only fault or negligence alleged was that of fellow-servants of the pursuer, engaged in a common employment with him, for whose negligence the defender was not responsible.

> The Lord Ordinary sustained the action as relevant, and appointed issues to be granted. The defender reclaimed. but the court adhered.

> LORD PRESIDENT.—There is issuable matter here. states that this man was on a scaffolding on the 6th of August, 1855. That the scaffolding was insufficient. That the attention of the defender's manager was called to its insufficiency, but that he failed or neglected to remedy it. That averment is relevant. another question raised as to the liability of the master for a colaborateur, but this is not the time for considering it.

The following issue was adjusted for trial:—

- 'Whether on or about the 6th day of August, 1855 years, ' the pursuer, while working in the employment of the de-
- 'fender, on a scaffolding at the National Bank, in Reform
- 'Street, Dundee, received injuries in his person, in conse-
- ' quence of the falling of the said scaffolding, by reason of
- ' insufficiency in the fabric and gear, or management thereof,
- 'through the fault of the defender, to the loss, injury and ' damage of the pursuer.'

The case went to trial, and the jury found for the defender.

COMPANY. Non-liability of master for injuries done to a

other servants.

DEGG v. MID-LANDRAILWAY 21st February 1857.—DEGG against MIDLAND RAILWAY COMPANY. -- 26 L J. Exch., p. 171.

Action for compensation by administratrix of James Degg, voluntarily as who was a clerk in the employment of Messrs. Pickford, when caused carriers, and on the day in which he met his death, he was by fault of the

occupied in the goods shed adjoining the Cheltenham station Deco v. Minof the defendants' railway, in loading goods for his employers. Company.

The porters of the defendants were trying to turn a truck master for inon a turn-table in the siding, and the deceased, seeing that juries done to the third parson. their strength was not sufficient for the purpose, called out voluntarily asthat he would assist them, and left his work and went on sisting servants While in the act of moving the turn-table, an by fault of the other servants. the siding. engine of the defendants', which was employed in moving trucks, was set in motion, and backed down the siding, and the trucks attached to it came in contact with the truck on the turn-table, and the deceased being forced against a wall, received the injuries which caused his death. Evidence was given that the accident was caused by the defendants' signalman neglecting to give notice to the engine-driver that the siding was occupied. The jury found a verdict for the plaintiff on the general issue, and for the defendants on the second plea, that deceased was at the time voluntarily assisting and acting with the defendants' servants wholly unauthorised by, and without the knowledge or consent of, the defendants—a rule was obtained, and the case was argued.

Bramwell, B.—The defendants were possessed of a certain railway and carriages and engines, and their servants were at work on the railway in their service with these carriages and engines. deceased, Degg, voluntarily assisted some of them in this work. Other of the defendants' servants were guilty of negligence about their work, and by reason thereof, the deceased was killed. The defendants' servants were persons competent to do the work, and the defendants did not authorise the negligence. We are of opinion that under these circumstances the action is not maintainable. The cases shew that if deceased had been a servant of the defendants. and injured under such circumstances as occurred here, no action would be maintainable, and it might be enough for us to say that these cases govern this, for it seems impossible to suppose that the deceased, by volunteering his services, could have any greater right, or impose any greater duties on the defendants than would have existed if he had been a hired servant. But we are pressed by an expression found in these cases, that a servant undertakes as between him and his master to run all and any risks of the service, including the negligence of a fellow-servant, Wigget v. Fox being cited for this purpose, and it was said there was no such undertaking here, but in truth there is as much in the one case as in the other. The consideration may not be so obvious, but it is as competent to a man to agree, and as reasonable to hold that he does agree, that if allowed to assist DEGG v. Mrn-in the work, though not paid for it, he will take care of himself LAND RAILWAY from the negligence of his fellow-workmen, as it would be if he were Non-liability of paid for his services. But we are also told, that there was and could

non-natury of paid to the services. Duty the the also total, that there was all to that master for in-be no agreement—that Degg was a wrong-doer, and therefore that juries done to the action was maintainable. It certainly would be strange that the voluntarily as-case should be better if he were a wrong-doer than if he had not sisting servants We are of opinion that this arugment cannot be supported. We when caused by desire not to lay down any general proposition that a wrong-doer other servants. never can maintain an action. If a man commit a trespass on land, the occupier is not justified in shooting him, or injuring him. the occupier were sporting or firing at a mark on his land, and saw a trespasser, and fired carelessly and hurt him, an action would lie. Nor do we desire to give any opinion on the cases of Bird v. Bolbrook, and Lunch v. Morden. Now it may be that had the mischief here arisen from the personal act of the master, he knowing that the deceased was there, the master would have been liable, and that as the defendants' servants knew the deceased was on the railway, and because they knew it, they were guilty of wrong to him, but upon what reason or principle should the defendants be liable? If a servant is driving his master in a carriage, and a person gets up behind, and the servant knowing that, drives carelessly and injures him, the servant may be liable, but why is the master to be responsible? The law, from reasons of supposed convenience more than on principle, makes the master liable in certain cases for the acts of his servants, not only in cases of the nature of contract, which depend on different conditions, but in cases independent of contract, such as negligent driving in public streets, when damage is thereby The public interest may require this for the public benefit. but why should a wrong-doer have power to create such a responsibility and such a duty? No reason can be assigned.

Judgment for defendants.

TUFF 2. WARMAN. Where an accident occurred by the negligence of defendant—a plain-

injury.

9th June 1857.—Tuff against WARMAN—26 L J., Com. Pleas, p. 263.

This was an action against the defendant for negligence tiff may reco-in the management of a steamer called the "Celt," on the ver, although Thames, whereby the plaintiff's barge was run down. The on his part re-defendant pled, 1st, not guilty; and, 2d, that he had not ted with it, if the control or management of the steamer. It appeared the defendant that the defendant was in charge of the steamer as pilot at care could have the time of the collision, and the plaintiff's barge was coming in an opposite direction, and the weight of evidence went to shew that the "Celt" was on the right side. no look-out on the barge, but plaintiff, when he sighted

the steamer, when half-a-mile off, ported his helm in obedience to the rules of the Merchant Shipping Act. The barge WARMAN. held on her course without varying, and the "Celt" kept dent occurred by the neglion porting her helm, until a collision became unavoidable, gence of defendant—a plain and did not slacken speed till close on the barge. The tiff may recove and did not slacken speed till close on the parge. In tiff may recovjudge charged the jury that the question for them was, there may be whether the defendant had injured the plaintiff's barge fault on his part remotely conthrough his negligence, the plaintiff not contributing to the nected with it, injury, and that if that were so, the plaintiff was entitled by ordinary to compensation, and that if two persons were navigating are could have avoided the invessels, and one kept a look-out and persisted in going on jury. where there must be an accident, because the other was keeping no look-out, and wilfully ran her down, he would His Lordship (Willis) referred to Davis v. Mann as an illustration of the law, and after commenting on the case and rules of navigation, told them, that if they thought the absence of any look-out was negligence, they were to consider whether it had contributed to the accident. also told them, as matter of law, that a man who kept on porting his helm, when a collision became inevitable, did wrong, and concluded—'If the defendant was negligent, or 'if the plaintiff directly contributed to the accident, you ' should find for the defendant, and if the defendant directly 'caused the accident, you should find for the plaintiff.' The jury found for the plaintiff.

A rule was obtained for a new trial, on the ground of misdirection, as to the defendant's negligence, and also that the verdict was against the evidence.

The cases of Butterfield v. Forrester, and Thorogod v. Bryan, were referred to in support of the rule—as to the former case, J. Cresswell doubted whether its doctrine was ever applied to a case of active negligence—it was a case of a nuisance on a road, a mere passive negligence on the part of the defendant. As to the latter case, J. Williams observed, that it was somewhat shaken by the comments on it in the last edition of Smith's leading cases.

COCKBURN, C. J., thought that the rule should be discharged— 'I think the direction right, and that the question is, the accident having occurred by the negligence of the defendant, whether the plaintiff's negligence has contributed to the mischief, and it although

' was for the defendant to make out the case on which he relies that ' the plaintiff never kept a good look-out, and that he thereby directly When an accident contributed to the accident which took place. That was left to by the negli-'t the jury, with such observations as were necessary, and the quessy the heght-the jury, with such observations as were necessary, and the questence of defen-' tion left seems to be the proposition of law applicable to the case; dant—a plaintiff may recov-' and the rule ought to be discharged.'

CRESSWELL, J. - As to the question of law, the learned judge, with there may be reference to the admiralty regulations, told the jury, that it was a fault on his part remotely con-question whether the plaintiff had, by neglecting to comply with nected with it, these, directly contributed to the accident. That point is disposed if the defendant of by the case of Dowell v. The General Steam Navigation Co. care could have (26 L. J. (Q. B.) 59). There Lord Campbell says—'In some cases avoided the in- there may have been negligence on the part of a plaintiff remotely ' connected with the accident, and in these cases the question arises. ' whether the defendant, by the exercise of ordinary care and skill, ' might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often quoted donkey case, Davis v. Mann. 'There, although without the negligence of the plaintiff, the acci-' dent could not have happened, this negligence is not supposed to ' have contributed to the accident within the rule upon the subject, 'and if the accident might have been avoided by the exercise of ' ordinary care and skill on the part of the defendant, to his gross ' negligence it is entirely ascribed, he and he only proximately caus-'ing the loss.' So here, without the plaintiff's negligence, the accident would probably not have happened, yet it may not have contributed to the accident, so as to come within the meaning of

WILLIAMS, J., concurred, but with difficulty.—He held that Dowell's case settled the rule in conformity with other decisions, that if the fault of the plaintiff is the proximate cause of the collision, he cannot recover, but if it is only remotely connected with the accident, than the question is, whether the defendant, by ordinary care, might have avoided the accident. So far the doctrine is plain enough, but then comes the question, what is meant by the expressions, 'proximate cause,' and 'remotely connected' with the accident, and that question must, plainly, some how or other, be disposed of at the trial. I entirely disagree with the proposition of Mr. Collier, that if the negligence of the plaintiff is either proximately or remotely connected with the accident, he cannot recover, but I have great difficulty in such a case, as to the propriety of the law being laid down to the jury without observation, as in the case of Dowell. However I may regret that the law is not on a more intelligible footing, still we must administer it as it has been laid down.

WILLIS, J., concurred.

Rule discharged.

14th July 1857.—Walls or LENAGHAN, and Others, Walls or LENAGHAN v. Pursuers; against Monkland Iron and Steel Co., Monkland Iron & Steel Defenders.—Jur. 29, p. 21-467.

Verdict for in-

This was an action of damages by the widow and chil-sion of firedren of a miner, who was killed by an explosion of fire-damp. Whether fault on the damp while employed in the service of the defenders, at part of the sinking a pit for ironstone near Airdrie. The defence was, that the injuries had arisen from the sudden escape of a large quantity of fire-damp, by the opening of a blower after a blasting of rock in the pit, and the subsequent imprudent conduct of the men themselves, over neither of which causes the defenders had any control, and for neither of which were they responsible.

At the trial (another action arising out of the same explosion had been ordered to be tried together.) the defenders required the Judge to direct the jury, in point of law, that if the deceased James Lenaghan and Edward Callaghan sustained severe bodily injury in consequence of an explosion of fire-damp in the pit, caused not by the fault of the defenders, but by the negligence or recklessness of themselves, or either of them, the defenders were entitled to a verdict, although it should be proved that, after being so injured, they had sustained further severe bodily injury from being detained for several hours at the bottom of the pit, by reason of the engineman, in neglect of the proper signal, unduly delaying to raise them, unless it should have been proved that the said further injury occasioned the deaths of the said James Lenaghan and Edward Callaghan. Lord Deas refused to give such direction, and the defenders The jury found for the pursuers; and in excepted thereto. addition to the exception, the defenders moved for a new trial, on the ground of the verdict being contrary to evidence.

The Court, on 18th November 1856, disallowed the exception, 'in respect the meaning of the directions asked 'from the learned Judge does not clearly appear on the ' face of the words employed.' But the Court set aside the

LENAGHAN v. IRON & STEEL

verdict, on the ground of it being contrary to the evidence. MONELAND and granted a new trial.

damp. Whether, fault on the miner?

The issues for the second trial were adjusted as follows: jury by explosion of fire- 'the said deceased James Lenaghan, when engaged in the service and employment of the defenders in forming or driving a stone mine or road in the said pit, with the 'view of searching for ironstone on behalf of the defenders. ' sustained severe bodily injury in consequence of an ex-' plosion of fire-damp in said pit caused by the fault of the And, 'Whether the said deceased after being ' defenders.' 'injured as aforesaid, sustained further severe bodily injury ' from being detained for several hours at the bottom of ' the pit, by reason of the person or persons in charge of ' the same, and of the engine, and cage, and apparatus con-'nected therewith, in neglect of the proper signal to raise ' the same, and of his or their duty, unduly delaying to ' raise the said deceased from the bottom of the said pit, or ' by reason of the engine, gearing, and cage not being in ' proper working order, and fit for the purpose for which And, 'Whether the death of the 'they were intended.' ' said deceased was occasioned by the said injuries, or by one or other of them, and by the fault of the defenders, ' to the loss, injury, and damage of the pursuer.'

The case was tried before Lord Handwide at Glasgow in May 1857, when the jury returned the following verdict:—'The jury, after having been kept enclosed in deli-' beration upwards of six hours, say, upon their oath, that ' in respect of the matters proved before them, they find ' for the pursuers on both the first and second issues, by a ' majority of nine on the first, and ten on the second; and 'assess the damages as follows-viz, £100 to Mrs. Walls ' or Lenaghan, and to each of the children who may be ' under fifteen years of age, £50.'

The defenders again applied to the Court for a new trial, on the ground that the verdict was ambiguous and uncer-'tain, and did not exhaust the issue by answering the third part of it, viz., whether the death was caused by the injuries received. The Court held the verdict sufficient, and pronounced decree for the amount found due by the jury, with expenses.

15th July 1857.—WILLIAM SUTHERLAND, Pursuer, against Sutherland THE MONKLANDS RAILWAY Co., Defenders.—D. 19, p. LANDS RAILWAY Co., Defenders.—D. 19, p. LANDS RAILWAY Co., Fault on the part of pursuer

The pursuer lost his arm while in the employment of bars damages. the defenders. He had been engaged as brakesman on goods train on the Bathgate branch of the Monklands Railway, and was told to act under the orders of the engineman, and especially of George Simpson, to whose goods train he was attached. His duty was to couple and uncouple waggons, and to use the brake for the purpose of slowing the train, his proper place being to stand on the hindmost waggon. The pursuer alleged that, at the time of the accident at the Blackstone Junction, no pointsman was placed there by the defenders, and to supply which deficiency in the arrangements of the railway company, Simpson the engineman was in the habit, in order to save time by not stopping the train, of ordering the pursuer. when the train neared the junction, to jump forward along the train till he came to the points, that he might descend as the foremost part of the train reached them, and then to jump on the train after the last part of it had passed the He also stated, that 'to do this formed no part of his duty as brakesman, and placed him in considerable ' danger.' In performing this operation by Simpson's orders. on 7th January 1856, the pursuer fell, and received the injuries by which he ultimately lost his arm. that it was the duty of the defenders to have a pointsman at the junction, and that their neglect of this duty caused him to do it, and that he therefore sustained the injury. The defenders pled that the pursuer's statements were irrelevant to support the action; that the accident was not occasioned by any neglect of duty on their part, but by the pursuer's own recklessness; and that the pursuer was wrong in obeying the engineman's orders to do what he did, and for which the defenders were not responsible. Draft issues were framed, on which parties came before the Court.

The LORD JUSTICE-CLERK said that he was of opinion there was no relevant matter on record to infer liability against the defenders.

LANDS BAIL-WAY Co. Fault on the

SUTHERLAND The pursuer expressly states that he was engaged as a brakesman to r. The Monk-act under the engineman. He states there was no pointsman at the junction with the main line, and that he was in the habit of supplying that deficiency. He says expressly that it was not his duty to part of pursuer act as brakesman to shift points, especially when the train was bars damages. in motion; but he goes on to aver that it was the duty of the defenders to have had a pointsman at the spot in question, and that they having failed in this are responsible for the accident. I think it a material point in the defender's favour that there was no pointsman. for it clearly shows that it never could have been their intention that the train should run on without stopping. The fault in this case clearly arose from the act of the engineman, and the Railway Company cannot be made responsible for his reckless actings.

LORD WOOD—The substance of the allegation is, that the defenders had engaged the pursuer as brakesman, and told him to act under the orders of the engineman, and especially of Simpson. said that he did obey Simpson, and that in obeying him the accident But I apprehend that it is not averred that it was intended that the pursuer should obey the instructions of the engineman except in his province of brakesman. It would have been different if he had been ordered to obey the engineman's orders, whether in his capacity of brakesman or otherwise. But I cannot extend the construction of the orders he avers he received beyond this, that they were orders to him in his capacity of brakesman. Thus, the case on the record falls, for the pursuer went out of his province, and met with the accident when acting in a different department of work.

The other Judges concurred, and the Court dismissed the action as irrelevant.

v. Birmingham CANAL CO. Negligence must be libelled against statutory trustees.

WHITEHOUSE 17th November 1857.—WHITEHOUSE against BIRMINGHAM CANAL Co.—27 L J. Ex., p. 25.

> When a work of a public character (as a canal) has been constructed under the authority of an act of Parliament, a right of action for an injury, not occasioned wilfully, nor by any act necessarily causing it, but arising from the uses of the work, (as, for instance, through the overflow of water in the canal,) must be founded on negligence, and negligence is of the essence of the action; and although the jury have given a general verdict for the plaintiff, and it has been found that the proximate cause of the injury was an act of the defendants' servants, (as raising a flood-gate,) yet if it is doubt-

ul whether that act necessarily must have caused the in- Whitehouse ury, and the jury also find that there was no negligence, CANAL C Negligence the verdict will be entered up for the defendant.

must be libelled against statu-tory trustees.

28th November 1857.—ELIZABETH COOK and CHILDREN, COOK, &c., Pursuers, against Robert Bell, Defender.—20 D. P., Hazardous em-137. 30 Jur., p. 75.

ploymentworkman held

Adam Cook, a miner, was killed in a coal-pit by the ordinary risks, and has no falling of part of the roof. The widow and children brought claim of dates of the coal-pit by the ordinary risks, and has no falling of part of the roof. an action of damages against the master—the issue sent to the master trial having been, 'Whether, on or about the 9th day of on his part.

- ' May 1855, the said Adam Cook, while in the service and
- ' employment of the defender, in removing stoops in the said
- ' pit, was killed by a portion of the roof of the said pit fall-'ing upon him, through the fault of the defender, to the
- 'loss, injury, and damage of the pursuer.'

The jury returned a verdict for the defender, and the pursuers moved for a new trial, on the ground of the verdict being contrary to the evidence. At advising.

The LORD PRESIDENT said—This case was tried before me at the March sittings, and the argument was then as now very fully gone But although the case was then fully heard and fairly tried, I do not regret that the motion now made and discussed has been so made, for it enables me to review the whole matter in a class of cases where, of all others, our leaning, if any, will naturally be with the pursuers. The question put to the Jury was, Whether this unfortunate miner, Adam Cook, lost his life in the pit in question by the fault of the defender. There was no dispute at trial as to the manner in which he lost his life, and the particular kind of working in which he was then engaged-stoop-working. The only question was, whether his death arose through the fault or negligence of the defender. Your Lordships will see from the printed notes of the evidence taken by me, that the fact as to the hitch in the roof was put to the jury. I also brought under the notice of the jury that part of the evidence as to the allegation made by the pursuers that the accident happened from insufficient and unsound wood supplied to the miners to support the roof, and also from wood not being put up in proper time to support the roof after the supporting coal was cut away. The practice in pits in regard to stoop-working is well The workmen work out as much coal as they can, leaving a support of coal for the roof or pillar as it is called. they cut away a portion of the pillar, they of course, weaken

Cook, &c., e. Bei i.. Hazardous emto undertake ordinary risks. and has no mage against the master without fault on his part.

the support for the roof, and it is then necessary to put up supports. That is done by erecting wooden props or supports. Hence peculiar danger, and the necessity of extra caution in this ployment— Hence peculiar da Workman held kind of pit work. There is no question raised, and no dispute in reference to the duty incumbent on the master on the one hand, and on the employed on the other. In cases where workmen, such as seamen and miners, engage in employments of great peril and danger. the duties encumbent on both the master and the employed are reciprocal and imperative. The duty of the owner in a case like this. is to supply wood of quality and strength sufficient to support the roof; and the duty of the workman on the other is to put it up in proper time. The question is. Whether, while working in that situation, life is lost, the master is liable? Though working in stoops is more than usually hazardous, it is also more than usually remune-Now, though it is necessary for the master or owner to provide good materials, on the one hand, there is a duty on the workmen not to be rash or careless, and not to be reckless in the performance of their labour on the other. Each has a duty to perform, which is incumbent on him to observe. Injury may arise from the rash or reckless manner of using these materials, or in not withdrawing from the stoop in proper time, when danger is apprehended. It was contended that the fall arose here—1st, from want of a sufficient supply of wood for the artificial support; 2d, from the wood being of inferior quality, railway sleepers being sent in place of fresh wood, and therefore unfit for the purpose.

Then, again, as to the matter of management and inspection, necessary on the part of those who have charge of the men in this pit, I don't see anything to show that M'Farlane, the overseer, was not

regular and vigilant in his inspection.

The third ground stated was, that there was a hitch or flaw in the It is alleged that the deceased ought to have been told of the existence of this hitch; but in answer to this it is stated, and the proof seems to corroborate, that he must have known of this. be this as it may, it is proved by several witnesses that the hitch had nothing to do with the accident. They say that it was a kind of hitch not attended with much danger, and was not the immediate cause of the accident.

It is said, however, that M'Farlane pressed them to work in the stoops after danger was imminent, but I did not think that was sufficiently made out.

Looking to all these matters, I left to the jury to say whether the death arose by the fault of the defender. At same time I did put to the jury certain considerations, such as—that this was not an action raised for injury arising from defect of machinery or any defect of that nature, but from a fall in the roof of a pit; that pitmen and seamen wrought under constant peril; that danger and peril were the ordinary condition of that species of labour; that there were duties incumbent on both sides—care on the one side, and caution on the I must say I saw no reason to think that the jury had gone wrong in their verdict, in the matter of evidence, and I remain still of that opinion.

LORD IVORY.—I am very glad that your Lordship has gone fully Cook, &c., into the case, and I entirely concur in that part of the judgment, v. Bell. where your Lordship states that there are duties incumbent on Hazardous emmaster and servant so as to make it necessary in this kind of work, Workman held for the master to have always ready a sufficient supply of wood or to undertake material, on his part, and proper care and caution on the other. It and has no is perfectly evident, in working in stoops, where there is always claim of dais perfectly evident, in working in stoops, where there is always mage against greater danger, these duties on both sides ought to be more rigidly the master The deceased knew that the stoop-working is more than without fault ordinarily dangerous. That being the case, it is said he did not on his part. know of the hitch nor of the danger. I think it is proved in evidence that he knew both about the hitch and of the danger, and that the accident by which he met his death arose from rash and reckless want of care on his part.

It was stated he was not provided with sufficient wood to support the roof—but I don't think that part of the case is established by the evidence. On the contrary, it is in evidence that there was plenty of wood at the pit mouth. If, however, it had been proved that he had frequently complained to the manager about the want of sufficient wood, and this nevertheless was not supplied, then fault would have attached to the master, and he would have been respon-But that is not the case here. Further, it is proved in evidence that he got wood which he did not put up. After he got this wood for the express purpose, it lay for some time before he put it up, while it appears it might have been put up in a few The jury are the best judges of the evidence. They have seen the witnesses, -and I do not think it prudent in the general case to interfere with their verdict. But in this particular case, it is in evidence by one of the witnesses that he had been spoken to Nevertheless Cook about taking work where there was a hitch. worked there. He is warned by his fellow-workmen, and still he persists in going on. There was, therefore, no failure on the part The wood is there, yet he does not put it up. of the master. fault, therefore, rather seems to have lain with himself, in too rashly working longer than he ought, and of delaying to put up the wood when it was brought to him.

Then as to the management, M'Farlane is proved to have been more than usually careful and cautious. If it had been proved clearly that M'Farlane had insisted on his working there after danger was apprehended, then that would have made a different case; but that is not established here. In short, it appears that this man-a little too anxious to gain a good wage, and a little too confident on his experience, had worked longer than he ought to have done, and thus met his death.

LORD DEAS.—The law laid down by your Lordship at the trial was acquiesced in on both sides, and in that law I entirely concur. There is a duty on both parties, and it depends on the nature of the operations whether that duty lies chiefly on the master or the work-Here I think it lay chiefly on the workman, for it is not contended that there was any other duty on the master than to supply

Cook, &c., bell Large of the second of the s

sufficient material to support the roof, and this only to such an extent as to enable the workmen to get out of the way when it was about to come down. The object was to take out as much coal as The operation was necessarily hazardous, and the temptation to engage in it was, that the more coal got out within a given time the greater the pay. The deceased was a skilled workman, and if the master furnished a sufficient quantity of wood I do not see in what his failure of duty can be said to have consisted. It might have been that in consequence of the hitch the work ought not to have been undertaken at all, and there might have been orders on the one side and remonstrances on the other. But nothing of that kind occurred here; for whether the hitch had or had not anything to do with the accident, it is impossible to say that the hitch was of a nature to create danger so great that there ought to have been no working at all at that place. There may be room for difference of opinion as to whether the hitch had anything or nothing to do with the accident. If it had been necessary to support the verdict to hold that it had not, I am not prepared to say that I should even then have quarrelled with the verdict. But upon the point on which the case really turns, there is no room for difference of opinion, namely, that whether the hitch had anything to do with the accident or not, the accident is not proved to have arisen from the fault of the master.

No doubt Anderson says they had not time to put up the props. and that putting them up would only have hastened the accident. But he obviously did not think this at the time, for he says, 'I was 'going to put one up, and Cook said to lay it down, for we had not ' time till we would get down some more coals. This was about ten ' minutes before the accident. What was meant by want of time. 'therefore, was simply a haste to get down as much coal as speedily and with as little labour as possible, the pay being by quantity and ' not by time. Accordingly, Stewart, the drawer, says that he re-' fused to draw the coals in consequence of the danger, and that 'rather than leave the place Cook drew them himself. I quarrelled 'him for not putting up the trees I had brought the night before. 'I did so for the safety of myself and them. He said he wished to 'God he saw it requiring them.' In like manner, M'Farlane, the underground manager, says that Cook had three good pit wood trees newly cut lying beside him. I told Cook there was no use in sending down wood if he was not to put it up. He said he had no need of it; he wished to God he saw more need for putting it up.

It is impossible to say that although the props had been put up there would still have been an accident. It was the duty of the party to do his best by putting up the props, and if an accident had then occurred it might have been a different matter. Even if the case stood on the evidence of the pursuer, I should think it impossible to say the accident occurred through the fault of the master. The fair inference would rather be that it occurred through the deceased's own fault. But when you take the whole evidence together, it is clear that not only did Cook not use the means in his power, but that his object was that the coal might come down more rapidly, he being willing to take the risk in order to get more profit.

The Court refused the motion.

2d December 1857.—Cook or HAGGART, Pursuer, against Cook or HAGGART r. JOHN DUNCAN. Defender.-D. 20. p. 180. 30 Jur., p. 99.

DUNCAN. Liability of employer for insufficiency of scaffolding.

John Haggart, a mason, was employed in working at Wallace Foundry, Dundee, the property of the defender for He had been employed by a foreman builder some months. in the service of the defender, who in this way did any work, or alterations in the buildings, of the factories. The defender had ordered the erection of an engine-house. and a scaffolding had been erected for enabling the masons to proceed with the work. The scaffold had been put up by the defender's foreman: it was 22 feet high, and was supported by two needles, about a foot broad and three inches thick: one end of them was inserted into the wall of the building. The needles were old black wood, that had lain The scaffolding gave way for six months in the smithy. while Haggart was working on it, and he sustained severe bodily injury. The masons themselves had assisted in getting the wood and erecting the scaffolding, and they and the foreman thought it sufficient. The wood was furnished by the defender: the foreman had charge of the erection. gave way in consequence of the breaking of one of the No precautionary means had been used to test the strength of the needles. The erection gave way from its inability to support the weight of the workmen and materials used in the building, for which it was constructed. The pursuer raised an action for reparation before the Sheriff of Forfarshire, maintaining that the defender was liable, because the wood was bad, and the needles insufficient for the purposes for which they were used, and that this was through the fault or negligence of the defender or his ser-That the test of the insufficiency of the erection was its having fallen without any undue weight having If the men were careless in selecting the wood. they ought to have been looked after by the master. defence, it was pled that there was no evidence of the wood being unsound, and it was selected by the workmen themselves; and further, that the erection gave way through

COOK OF HAGGART P. DUNCAN. Liability of employer for in-ciency. scaffolding.

mere accident, the pursuer being unable to prove any specific defect, and that no responsibility lay for a latent insuffi-The Sheriff gave damages: and in an advocation sufficiency of the Court adhered.

> LORD MURRAY.—There is a great lack of evidence in this case, but we must give effect to it as a whole. There is no proof that the wood was unfit for use, except that the pursuer argued that it was so because it gave way. It was also pled, that the master was liable for the carelessness of the workmen in protecting themselves. this point. I am of opinion that workmen are not to be taken care of like children, and that they are bound to pay due regard to their own lives and safety. This is not a case where there was a great complication of machinery, of the sufficiency of which the men could not In such a case the whole responsibility rests with the master. But in a case like the present there is a joint responsibility, both with master and servant. Still, taking the evidence as a whole. the leaning I have is in favour of the unfortunate man who was injured.

> LORD JUSTICE-CLERK.—I take the same general view of the evidence as a whole, although I do not concur in all the findings of the Sheriff and Lord Ordinary. There was a scaffolding, upwards of 22 feet high, supported by two needles. It was the defender's duty to have seen that these were sufficient; and even although he left it to the masons themselves, he was bound to have taken measures to ascertain whether the scaffolding, intended to support two men with their materials, was sufficient for that purpose. The fact that it fell when two men with their materials were put upon it, four days after it was put up, is to my mind sufficient proof that it was not adequately supported. In that case the defender's foreman, who was present when the scaffolding was put up, and who knew it was intended to bear a certain weight, is to blame.

> LORD COWAN.—I think that this is a case of delicacy. I do not wish to affirm the proposition, that in all cases where there is an accident resulting in an injury to a workman, his employer is liable to him in damages, unless he show conclusive cause to the contrary. I cannot go on the ground, that because the scaffold fell it was bad. The simple view I take of the fact is this, that we have evidence that this scaffold was intended for workmen to stand upon in order to reach their work, at a considerable height above the ground, and that it was supported by two needles. Then what the defender's own witnesses say is, that it was intended for the support of two workmen and their necessary building materials, and that it fell from too much weight being put upon it. I think it therefore proved, that it broke because it was over-weighted, and that at the time of the accident there was upon it not more than the weight it was intended and ought to have been constructed to bear. It follows that it must have been an insufficient erection. On that ground I concur in holding that there was negligence on the part of the defender's ser

vant, at whose sight the scaffold was erected.—a negligence for which the defender is responsible.

Cook or HAGGART v. DUNCAN

The Court pronounced this interlocutor:— 'Find, in point Liability of employer for in' of fact, that the scaffolding, erected by the directions of the sufficiency of ' defender, and for building operations which he was carry-

- ' ing on, was insufficiently supported, considering its height,
- ' the materials and workmen to be on it: Find that it was
- 'intended to carry the weight of two men and building
- ' materials; but find that, in four days after erection, one of
- ' the props snapped with the above weight. Find, in point
- of law, that the defender is liable for the insufficiency of
- ' the scaffolding, and modify the damages to £50, for which
- ' sum decern against the defender. Find him also liable in 'expenses.'

5th June 1857.—DAVID BALFOUR, Pursuer, against BAIRD BALFOUR v. and Brown, Defenders.—20 D., p. 328. Jur. 30, p. 124.

BAIRD and Brown. Non-liability for the death of

This was an action of damages as solatium for the death a child on the owners of the of a child. The defenders were timber merchants in Glas-premises where gow, and occupied premises bounded by the Forth and trespassing. Clyde Canal, near the canal basin. The traffic in the locality is considerable. Besides the path along the canal, for the purposes of its traffic, and in the occupation of the Company, there was a space between it and the premises occupied by the defenders, unenclosed; and, by agreement between the Canal Company and the defenders, they were allowed to lay down wood on it. The wood was piled along the canal each pile being separated by an open space of about three feet from the other, running at right angles The public had no right to frequent the from the canal. banks, but were not hindered; and, in point of fact, people went there, and particularly children. Some boys were there in May 1855, and among others two sons of the pur-One of them, aged about ten, went up a space between two piles of the wood, and one of the piles fell on The present action of damages him, whereby he was killed. was raised against the defenders, on the ground that the death was 'caused by the culpable, reckless, and negligent

BALFOUR #2. BAIRD and BROWN. owners of the premises where the child was, trespassing.

' conduct and proceedings of the defenders, or others for whom 'they are liable or responsible, in so far as a quantity of Non-liability wood or timber, in logs or planks, commonly called or known a child on the as 'battens,' belonging to the defenders, having been owners of the stacked, stored, or piled up, in a reckless, careless, culpable manner by the defenders, or others for whom they are ' responsible, and that in a place of public thoroughfare and 'resort, at, on, or near the south or south-west bank of the ' canal, at or near Port-Dundas, Glasgow, the same, or part 'thereof, at said place, and on foresaid date, fell upon or ' with the said boy, William Balfour, and so crushed or 'bruised him, particularly near or on his head, that he in-' stantly, or within a few minutes of the occurrence, expired'

The defenders denied that there was culpa on their part. or that the wood was carelessly or unskilfully built up. They attributed the accident solely to the fault of the boy himself, in trespassing amongst the piles on the banks of the canal which was the private property of the Canal Company. After a proof had been led, the Sheriffs found damages due, holding that, in the circumstances of the case. it was a case of culpable negligence of the defenders to nile up and keep the battens on the place, and in the manner they did; and that they were consequently responsible for the consequences of injuries to the lieges, and to the pursuer for the death of his son. The Sheriffs held that the case was not within that of Davidson, 5th July 1855, as the express ground there was, that the danger was open and notorious. and the risk of it inevitable, and that the parents should have kept their child, of three or four years of age, out of the chance of going near the place. The defenders advocated, maintaining that the banks of the canal were the property of the Company, and not a thoroughfare. Though it was practically impossible to exclude persons from passing along who had no business there, yet it was not a place intended They resorted thither at their own peril, and for idlers. neither the Canal Company nor the defenders were bound to take charge of children, who went there to amuse themselves. nor were they bound to consult the comfort or convenience of parties who had no right to be at the place: besides, the boy had left the path, and had trespassed upon the defender's

premises—his misconduct caused the occurrence. of proving the case lay on the pursuer, and it was not proved that the piles of wood were shaky or unsafe. pursuer argued that the piles were found to have been inse-a child on the owners of the curely built—in a place of public resort—for injury thence premises where arising the defenders were responsible. The doctrine that the child was a claim for damages was barred by the culpa of the injured party did not apply to the case of a young child, who could not be supposed capable of destroying both public and private property—parties leaving goods in a dangerous position, accessible to children, are liable in the consequences.

The onus BALFOUR v. Brown. The Non-liability for the death of

The Lord JUSTICE CLERK.—This is a very important case, for the judgments complained of carry the liability of the owners of goods, for the consequences of accidents, and for compensation to parties, to a length unheard of in any other case. As I wish to avoid details, I shall give a general summary of the facts which I think have been proved. The banks of the canal belong to the canal com-This portion of the banks is in the vicinity of the canal har-The Sheriff-Depute says it is part of the canal harbour, and describes the place as bounded by warehouses, &c. That was admitted to be a mistake, or at least not an accurate description of the locality, whether part of the harbour or not, but it is at least a very busy part of the canal for shipping and unshipping goods, especially timber. The bank of the canal at this place is at least thirty feet There are timber yards on the property lying beyond, and outside of the bank of the canal. The advocators have a timber-yard on the side of this part of the bank. They and other timber merchants have been for a long period, for the convenience of trade. allowed to pile up battens of wood at the side of the canal bank next to their yard, six or seven feet in length, and sometimes five to seven feet high—the battens being laid flat, the one above the other and several battens in the breadth of the pile. The battens lie at right angles to the line of the canal, the ends being towards the timber-yard and towards the canal. Such is the mode in which the wooden battens are piled to be ready for use, not being required to be in the timber-yard as they are to be carried off when they are to be used. For this privilege a rent is charged—nominal, indeed so as to mark that this is done by permission, but it is done under the permission of the owners of the ground, the proprietors and guardians of the canal, entrusted to keep the space along the canal required for traffic clear and open. The space so left is, at the yard of the advocators and beyond the battens, 26 feet clear for the passage of carts and of others doing business. Now of the propriety of allowing the battens to be so placed, and of the sufficiency of the breadth of passage so left free, the canal company are the proper and best judges, and may competently regulate that matter as they

Their interest is to accommodate trade in every way. The

choose. BALFOUR #. BAIRD and trespassing.

wood is unshipped along the banks. It is a great accommodation Non-liability to pile up the battens, as they are not for use in the timber-vards for the death of till they are required. They find this to be the case, and they alowners of the low various timber merchants so to pile battens opposite their yards owners of the They are entitled to do so. They have a deep interest in the breadth the child was of the space left free along the canal for general traffic, and they are entitled to regulate this. They find a sufficient and satisfactory space so left open. They and their officers are satisfied, and no complaint is made by the trade. That there is much resort to the place is quite true; but the space left free is sufficient for the convenience of the public. The notion that any law interferes with the rights of the canal company and their arrangements seems to be extravagant. except that the canal company must provide for the traffic which They have done so, and there is no other law applicable they invite. What the advocators did was by their permission; and to the case. no one having occasion to use the canal and canal bank complains that the accommodation for the public is interfered with.

Then the wood merchants pile these battens in the way found convenient and sufficient, and according to the use of this trade. and of the shippers who buy them. This mode of piling them has gone on for many years. It is entirely for the accommodation of the wood merchants, and they do so in a business-like manner,

keeping the piles distinct.

I do not understand what is meant by the application of the term public thoroughfare, and even public highway, as applied to the bank of the canal. It is not dedicated to the use of the public as a road independently of the traffic connected with the canal. No right of a road as a highway for all and sundry is constituted by the canal statute on the canal bank, over its whole breadth or any part It is bought for the use of the canal and the traffic on the That numbers may resort to the bank from canal, and it is so used. idleness, to see what is going on, though they may not have business to do, and without having any traffic on the canal, is what always happens in such circumstances; that boys will frequent such a place in numbers, and often, as appears here, to the annoyance of people carrying on traffic, is to be expected. But boys have no business there, they are there only to amuse themselves. They have no right to be there; they come only for idleness and amusement; the place is for business, and for business connected with the canal.

Then what happens? This boy and some companions get on the canal bank, the others get on board to pick up what they can—and this boy of ten leaves the open space and goes up between two of these pile of battens, which are about three feet apart. I care not for what purpose he is supposed to have gone, whether for amusement or not. That he went to climb up on the battens, which we see is a common practice, as might be supposed, with boys, I have little doubt, but for whatever purpose he went he had no sort of right to be where he was. It was a place plainly marked out as one to which no one should resort except those who had charge of the

piles of wood, and this was quite patent and palpable even to a boy of ten. It was no part of the free space left for those passing by, and he was as completely where he should not have been as his Non-liability brother and companions who went into one of the canal lighters. He for the death of goes out of sight between those piles into this narrow space, and im-a child on the mediately the noise of some battens falling is heard by his brother, premises where and he is found dead, some of the battens from the top have fallen the child was upon him. What he had been doing, how they came to fall, is not trespassing. known, and that is one peculiarity in a case in which the advocators are found liable in compensation as having by their recklessness and culpable conduct caused the boy's death. One thing is quite certain, viz., that the battens did not fall of themselves, that is to my mind perfectly clear. The upper battens had a slight inclination to the other side, viz., to the east, but if any fell to the westward, no sort of explanation can be given. That they were touched and meddled with, cannot I think be doubted, but at all events the contrary is not proved.

BALFOUR y.

But any theory in this part of the case is of little importance in my view. The battens were placed by the leave of the canal company at this as a proper and appropriate place, it was an appropriate use to make of the place. This had been done long by them and neighbouring wood merchants. They were piled in the way practised for the purpose and as all are piled—according to the conveniences of the wood-merchant and the boatmen who bring them. is said that this particular batch of battens was insecurely piled. I do not think that is proved; and the upper battens, the most likely to be loose, had been removed two days before for use. But further, the wood merchants, or the shipper who piled the battens. leaving the narrow aperture between them, was not under any obligation to pack them so as to protect persons who choose idly to go in between the piles. In many instances, a party is bound to guard Whether in the case of against accidents to those passing by. old coal-pits the doctrine has been carried too far we need not con-But those packing these piles were under no obligation to provide by extra precautions, against any one choosing to be on the open free space and to introduce himself, no matter for what purpose, between these piles of battens—so placed as to mark even to a boy that no one was to go between them, as they are close up to the timber-yard so that boys could not even go round the inner ends of the piles for amusement. The notion of a boy being on a thoroughfare when between these piles of battens, appears to me to be And if the expressions are used in reference to the supposed illegality of putting the battens on the bank, the answers are as I have observed manifold. 1. That was done with the leave of the canal company, who had right to sanction what was done. 2. That it was an appropriate use of the ground, for the traffic of the canal. 3. That the bank is for the convenience of those having business on the canal. 4. That the space is not dedicated to the resort of the public for amusement and idleness, quite the reverse, and though the resort of boys and other idlers cannot well be prevented,

Balfour y. Baird and BROWN. Non-liability trespassing.

yet such are trespassers who ought not to be there. That the notices put up are not enforced, is true, but even boys know that the canal bank is for the traffic of the canal, and they go there just for for the death of the purpose of getting amusement from the bustle and objects at the a child on the canal, such as sailing on the wood floating in the canal basin (as this owners of the promises where boy had done) getting into the ships, playing on the wood as is often the child was done, in all such cases exposing themselves to danger through idleness, by being where they are only as trespassers.

It was said the piles of wood were not enclosed by any fence, of course not. 1. That would have been quite inconsistent with the use of the ground for the purpose sanctioned by the canal company. 2. It was not required by the canal company, who were the judges of what was proper in the circumstances, and 3. It was plainly unnecessary and useless, considering the breadth of the open space left free for passage.

Upon all these grounds I am of opinion that no liability attaches to the advocators for the accident which happened to this boy.

LORD COWAN.—Such being the place of this unfortunate occurrence, the case is a striking contrast to the decisions referred to by the Sheriff-Substitute. Take first the case of Hislop v. Durham. 14th March 1842, as to an accident from the mouth of an old coalpit being unprotected. It is a mistake to view that case, as having had reference to a pit within a enclosed park, there is no such statement in the Report. On the contrary a private road led from the highway, and then another path from this across the field, which the deceased took to reach her father's house. There was no enclosure. to separate this path from the pit; but the pit was not duly fenced and the owner was found liable, on the principle that he had failed in his duty to protect the public. And the same general principle had been fixed by an earlier judgment. Again, nothing can be stronger than the contrast between the case of Parlane 25th February 1825, and the present. There a party was building or altering a house in a public street, and had dug a hole for a cellar, but did not protect the street from that excavation, and a poor woman tumbled into it in the dark.

These cases differ essentially from the present; but there are two recent decisions, in which views which had been sanctioned in the inferior Courts in reference to this class of cases were properly corrected, which are more in point. The first of these was Davidson v. the Monklands Railway Company, decided by the First Division of the Court, and the other case was in this Division-that of Lumsden v. Russell & Son, 1st February 1856, in which we unanimously gave effect to the same principle. The circumstances of this last case were not the same as those here, but the principle was. chinery was not sufficiently protected, on the assumption of children having to do with it, though safe enough for grown men. went near it and was killed. The defence we sustained was, that the child had no business to be there, and so there was no ground for damages.

The principle which ruled these cases is most applicable to the

circumstances of the present case. The place where the accident happened was private ground and not a public thoroughfare, though unenclosed, the purpose for which it was used did not require that, Non-liability and the proprietors would not allow it to be enclosed. It was not for the death of watched, because that was unnecessary as regarded grown people, a child on the

and more especially no child had any business to be there. As to the second point—the manner of piling the battens. they been placed in a reckless way, interfering with the roadway at trespassing. the side of the canal, and had some person who had a right to be there been injured, the case would have been different. From the proof, it is manifest that the battens were piled in a way usual and suitable for the locality, with their ends to the canal, and plenty of space left between them and the water, and that they were placed so sufficiently that they had stood for two months. No doubt one witness says they were shaky, and that the wind might blow them over, but then there was no wind at the time of the accident. Moreover the boy who had no right to be at the spot, must have gone between the piles. The inference your Lordship has drawn, though not necessary to the case, seems just, viz., that the pile must have been brought down by the boy climbing upon it. At all

events, the boy went where he had no business to go, between the battens, and which are not proved to have been improperly placed On this part of the case, then, the findings in the inferior Court are wrong. It lay on the pursuer to prove culpable negligence, and the proof has not established that as matter of fact.

LORD ARDMILLAN.—Though this case is important in point of principle, and particularly so when we look at the views of the Sheriffs, yet it has not been a subject of much difficulty to my mind I concur with both of your Lordships in thinking the judgments in the Court below establish a liability on grounds not recognized in any of the previous decisions, and not supported even by the decisions in the other cases referred to by the Sheriffs. Of course, we must sympathize with the father of the child, but he can only obtain reparation, if he has proved that the death of the boy was caused by fault on the part of the defenders, and the burden of that proof lies upon him. He has alleged culpa, and he undertakes to prove it, and the Sheriffs have found that he has done so. I cannot arrive at that conclusion. It must be either as regards the selection of the place, or the mode of deposit, that this culpa must be brought home to the defenders. The place was one where the deposit of such battens was to be expected, and was expressly permitted by the canal company, the proper guardians of the place, whose duty it was to see the public sufficiently accommodated for carrying on the business of the canal; and the ground had long been used for that purpose, and a sufficient space was left free for the necessary thoroughfare. In one sense it was a public place—so is a harbour—but public for the business for which it was intended, not for idlers, or for children. The defenders were not bound to enclose the piles in such a place, and, from the evidence, it appears that they had not power to do so.—Judgment for defenders.

BALFOUR y. BAIRD and premises where Had the child was LATCH v. THE 13th January 1858.—LATCH against THE RUMNER RAIL-RUMNER RAILWAY Co. WAY Co. 27 L. J. Ex. p. 155.

RAILWAY Co. Prima facie evidence of negligence overcome by proof of a wilful act of a stranger.

The railway was a single line, and for the purpose of allowing trains to pass each other there was a siding with points at each end, worked by 'levers' to turn the trains on and off the siding from the main line. The train in question had passed the siding, and there was evidence that at a quarter-past five the points were all right, and that at four a train had passed all safe. At half-past five the train with trucks belonging to pursuer came up and went off the line, which caused them to be injured. There was evidence that immediately after the accident a stone was found inserted under the lever of one of the points, at the place where it occurred. The defence was, that this had caused the accident, and that being the wilful act of a stranger, they were not liable.

The Judge told the jury that, in his opinion, there was no evidence of actual negligence, and that if the defendant's account was correct they were entitled to the verdict, unless the jury thought that there was negligence in not having a person to take care of the points at the place in question, which his Lordship said he did not think there was. The jury found for the plaintiff. Defendant obtained a rule to set aside the verdict, and for a new trial, as being against evidence. The Court made the rule absolute.

Pollock, C. B.—There was evidence that there had been a wilful act on the part of a stranger, which would have caused the accident, and no evidence of negligence on the part of the defendants—none was suggested except the not having a person always at the spot to look after the points, which they were not bound to have. The siding had been in that state for months, and no accident had happened. The verdict was clearly contrary to the evidence, and there must be a new trial.

ALSOP v. YATES. Non-liability of master for injuries where servant sees the January 18, 1858.—Alsop against YATES.—27 L. J., Ex. 157.

vant sees the The plaintiff was in the employment of the defendant, risk and continues work. The defendant and engaged in the erection of a building. The defendant

was the contractor for the works, and was occasionally there: but he had a foreman (who was admitted to be a person of Non-liability of competent experience) who had the constant superintend-master for injuries where serance. The plaintiff was a labourer employed at the work vant sees the risk and conti-There had been a hording put up, for the purpose of protecting nues work. the building from persons passing in the street, and carriages passing on the road; and, according to the pursuer's evidence, he had complained of the hording: but it appeared to be clear that the complaint he made was, that the hording was too narrow, and he had not room to pass with a hod of mortar between it and the crab and cradle that had been erected there. 'Then it appears (per B. Martin, who delivered the judgment) that when he was working a vehicle. on coming up the street, where there was plenty of room. struck against the hording, in consequence of which he got He then brings an action against the master, his employer, and insists there was some evidence to go to the jury. I apprehend there was clearly none, for a very simple reason, that he himself, after he had complained, continued working there voluntarily, with full knowledge; and having done so, it was quite idle to suppose that he can maintain an action against his master in respect of any injury occurring in this way. I think there are various other objec-It seems to me, according to the pursuer's own view. that the part the master takes in it was a great deal too His Lordship showed that there was no negligence proved against the master. Nor was the pursuer in a condition to recover against him under the circumstances. discharged.

In the course of the discussion the question was raised. Whether the driver of the vehicle would not be liable? was maintained by plaintiff that both might be liable—but that did not show that the defendant was free-both or either may be liable (B. Martin). No doubt there are cases in which that has been held (Rigby v. Hewit). many modern cases in which a negligent person has been held liable for an injury, the immediate cause of which was accident, or the act of an innocent party; as, for instance. the case of a child getting into a cart left carelessly at the door (Lynch v. Morden, 1 Q. B. Rep. 29).

VOSE V. THE JANCASAIRE & YORKSHIRE RAILWAY CO. Liability, by negligence, for injuries to a workman at a Railway station

Vose v. The 18th January 1858.—Vose against The Lancashire and Yorkshire Railway Company.—27 L J., Exch., p. 249.

This was an action under Lord Campbell's Act (9 and 10 workman at a Vict. 93). It appeared that at a station, occupied jointly. Railway station and used by the defendants and the East Lancashire Railway Company, the husband of the plaintiff was employed in a siding mending some waggons. The persons having care of the station were in the service of both Companies, and at the siding in question there was a pointsman, a signalman, and a shuntsman, besides the station superintendant. noise of the deceased's hammering might have prevented his hearing the whistle of the approaching engine, but there was no distinct evidence of the whistling having taken place: but the usual signal had been given; and the officials all stated that everything was done according to the regulations of the Company. It did not appear that they could see the deceased at work, and the engineman could not have seen When the engine came, in it drove the two waggons together, and crushed deceased between them. The Judge put it to the jury, 1st, Whether the occurrence had been in any degree caused by the carelessness of the deceased? They found that it had not. 2d. Whether it had been caused by the carelessness of the Company, or their servants, as in not having some one who could see the deceased and warn him, or the engine-driver. found that it was caused by such negligence. ther it was caused by any negligence of the Company's servants in disobeying the rules? They found that it was not, but that it was caused by the negligence of the Company in not having better rules. The Judge, on this finding, held that the Company was liable, and entered the verdict for the plaintiff. The defendant obtained a rule to set it aside as against evidence.

The Court, per Pollock, C. B., discharged the rule:—'The jury have found distinctly that the defenders were guilty of negligence; and the jury have farther found, that no other person to whom any personal negligence could be imputed was guilty of any negligence at all. They have found that the deceased was not guilty of any negligence; they have found that the shunter was not guilty of

' any negligence, and that the man who takes care of the points at VOSE v. THE 'the siding was not guilty of any negligence, and they have, by their the Yorkshire verdict, thrown the whole negligence on the defendants, the Com-RAILWAY Co. ' pany, who, it may be observed, were not the employers of the de-Liability, by ceased. The deceased was not a servant of the Lancashire and negligence, for 'Yorkshire Railway Company. He was a servant of the East Lan-workman at a 'cashire Railway Company. Under these circumstances there is no Railway station complaint against the direction and ruling of the presiding Judge, at least the motion does not take the form of any complaint against ' the finding of the jury. After stating that the verdict of the jury ' must be taken as the fact of negligence on the defendants, and on none others, his Lordship proceeds: The question we are dealing ' with is. Whether we shall enter the verdict for the defendants? I ' own I, for one, upon this narrow ground, and some of my brothers. 'I believe, upon larger grounds, are all agreed the rule must be dis-'charged, and the verdict should stand. I must say now (I am speaking merely my own personal private opinion) I think we ought to be extremely cautious how we relax the rule that was laid 'down in this Court originally, but which is now undoubtedly the ' law of the land with respect to servants in a common employ suf-' fering by the negligence of each other. I believe there never was a more useful decision, or one of greater practical and social im-' portance in the whole history of the law. I believe it was the law. 'I strongly understood it to be so before attention was called to it; ' for if it had not been so, we could hardly have lived in the present century without having actions brought over and over again. No ' such action ever had been brought before the time when it was proposed to make a master liable in respect of one servant for the negligence of another. I think we ought to be exceedingly cau-' tious how we allow what I must say I consider to be the important benefits of that decision to be frittered away by nice distinctions, ' or to be broken in upon by the ingenuity of advocates, or by the ' verdict even of juries. But, in the present case, I am by no means ' prepared to say I should have concurred in any disturbance of the 'verdict as it stands; but there it is, it is the verdict of the jury 'upon what I think we must act, or grant a new trial. On these ' grounds, in which I believe most of the Court concur, the rule must be discharged, and the verdict for the plaintiff must stand. discharged.

21st January 1858.—Hugh O'Neile, Pursuer, against O'Neilev.

George Neilson, Defender.—D. 20, p. 427. 30 Jur., Neilson.
p. 230.

p. 230.

p. 230.

The defender had the Dalmarnock colliery, and the pursuer was a boy in his employment in the pit. Access was

from master.

Nellson.
Fault on the of the two seams there was a circuitous and inconvenient party injured bars damages route; and the defender at the request of the sunk a 'blind shaft' vertically, to connect both seams so that direct communication could be got from the one to the other without going the circuitous route. The length of the shaft was about twenty fathoms; and a ladder was placed in it secured to needles, which were cross bars of wood, supporting the guide-rod for the passage of the cage. There were nineteen needles, between which and the outside steps of the ladder there was a clear interstice of four inches. Though the ladder was generally used, some of the men used to ascend and descend the shaft in the cage. pursuer, in descending the ladder, fell from it when a considerable distance from the bottom, and received severe in-He raised an action of damages against the defenders, on the ground of the insufficiency of the ladder, forming the only entrance to the pit, 'and which ladder was unlaw-'ful, was old, and of improper construction, out of repair, 'and in a very unsafe state.' The action was raised in the Sheriff Court of Glasgow, and a long proof taken. The Sheriff-substitute. Skene, assoilzied the defender, in respect that he held it not proved that the accident arose in consequence of any insufficiency or defectiveness in the construction of the ladder itself, but that the proof showed that the pursuer fell through the hasty and reckless manner in which he was descending the ladder. appeal, Sheriff Alison altered the judgment, and decerned for £50 of damages. He held that, about the time of the accident, the ladder was rather shaky, and slippery, from dirt of men's feet going up and down it, and that the pursuer had complained to the overseer of the slipperv and dangerous state of the ladder. That obliging men to go up and down a perpendicular ladder of 120 feet high was attended with danger, and doubly so to a youth like the pursuer; and that there was no evidence of the defender having taken that care which was incumbent on him, when he imposed upon his workmen such a perilous mode of ascent In an advocation, the Lord Ordinary recalled the Sheriff's judgment, and assoilzied,-holding that the



ladder had not been proved to be a dangerous and improper access to the working in the pit, provided due caution was Fault on the used, and that the allegation of imperfect construction was barry injured not proved, nor that the pursuer fell in consequence of any-from master. thing defective or insufficient in the ladder. The Court adhered, adding that the pursuer was descending the ladder in a hasty and reckless manner.

O'NEILE v.

LORD JUSTICE-CLERK.—The ladder is stated in the summons to be unlawful to be used in a coal-pit. What that means I really do not know, and it was not explained; and it is further said that it was old and out of repair, and of improper construction. What in reality is said is, that there was something else that rendered what was itself a proper ladder dangerous. None of these points were insisted on. It is obvious that beyond this the pursuer cannot go, though he has imported into his case an allegation that the ladder was slippery. Was there ever a ladder at the bottom of a coal-pit that was not wet and slippery? Then this boy is proved to be incautious. He had been talked to on the subject, and 'cuffed' for it; and upon this occasion it is proved that he began his descent by descending too quickly; nevertheless he continues to do so most rapidly and carelessly, and in a way in which he could not retain his hold if anything occurred to disturb his descent. It was pleaded that he was too young a boy to be employed in this way; that would put an end to the employment of boys in coal-pits at the age at which the Act of Parliament allows them to be so employed. He was incautious and careless, and he is proved to have on this occasion come down too The Sheriff-substitute has found that he fell from an accident, caused by the hasty and reckless manner in which he was descending the ladder. The Lord Ordinary has not repeated that finding, I do most certainly agree in it.

29th January 1858.—HELEN STIRLING or HARDIE, Pur-STIRLING or suer, against Messrs Adie, Miller, and Rankin, De-Adie, Miller, & Rankin.

20 D 20 D 553. 30 Jur., p. 247.

Master held re-

sponsiblefornegligence of his

William Hardie, the pursuer's husband, was an under-underground ground manager in a coal-pit belonging to the defender at coal-pit. Rosehall, and was killed by the falling of a large mass of stone from the roof of the pit. The pursuer pled, that the death was caused by the omission, fault, negligence, or carelessness of the defenders; while, on the other hand, the defenders contended that they were not liable, as it arose either from the carelessness of the deceased, or from damnum

Stirling or fatale: and if it should appear that the accident arose from his under-

ADIE, MILLER, the fault of the general underground oversman, no damages & RANKIN.

Master held re- were due by them as masters for the fault of a fellow-sersponsible for vant. A proof was led by both parties, and the Sheriff, altering an interlocutor of his substitute, found the defenders liable groud manager in £100 of damages. In an advocation, the Lord Ordinary. and subsequently the Court, adhered. In a note by the Lord Ordinary, he says: 'For the defenders, the chief defence ' relied on is, that, at the time he was killed, William Hardie ' was local underground manager of the pit; that it was ' part of his duty to see that the roof, at the place from which ' the stone fell, was properly supported, and that his death ' was occasioned by his own negligence. To the Lord Ordin-' arv it does not appear that the evidence adduced is sufficient ' to support this defence. It is clear, from the account given ' by Archibald Neil, the underground manager, and others. 'that Hardie was engaged as roadsman and fireman in the ' pit, and that his proper duty was to look after the roads 'and fires,—that is, to lay the rails on the drawing-roads. 'and keep them in proper order, and to attend to the ' ventilation in both seams of coal, in which about a dozen ' faces had been opened, and about twenty men were em-' ployed,—a work abundantly sufficient for any one man to In considering the special defence, there is one ' feature of the case which is peculiarly unfavourable for the ' defenders. It is clearly established, that about a day or two 'days, before the accident occurred, the dangerous state of ' the roof, at the place where it afterwards gave wav. was pointed out by some of the colliers to Neil, the under-' ground manager, who, after inspecting the roof, in place of 'giving orders for supporting it, directed the men to proceed ' with their work, which they did, trusting to his supposed 'skill and experience, in the belief that there were no serious 'grounds to apprehend danger.'

The LORD PRESIDENT, at advising, said :- The result at which we have arrived in this case is, that the interlocutor of the Lord Ordinary is right. We have gone over the proof carefully, and there is no doubt conflicting evidence and discrepancies in it; but, looking at it as a whole, we think it is in favour of the pursuer. The first point is as to the cause of death by the falling of the stone. there is in regard to his some contrariety of evidence; but giving

that due effect, and considering the mode in which this part of the pit Stirling or was wrought, viz., on the 'long wall' system, we are of opinion that Addie, Miller it fell from want of due support. The question then is, Whether & RANKIN. that was owing to the negligence of the defenders, or any one for Master held rewhom they are in law responsible? There was some argument as to sponsible for negligence of whether it was not the parties employed in erecting or building a his under-wall to support the roof, who were liable in respect of want of due ground manacare in doing it; but it does not appear that the wall was carried so ger in a coalfar as to admit of its interfering with or causing the fall of the stone. The pursuer avers that it was through the fault or negligence of the defenders, or their pit manager or superintendent, Neil, that the deceased met his death. Hardie, on the other hand, is stated by the defenders to have been the local manager of the pit, and that it was to him as superintendent underground that the defenders looked to see that the roof was properly supported; and the question is, What was his primary duty in the pit? I think that it is clearly proved to have been the duty of the roadsman and fireman to clear the pit of fire-damp, but he had no charge of seeing that the roof was properly supported, and of providing against apprehended danger from it falling. There was another manager, to whom Hardie was a mere subordinate, and whom he was bound to obey. This was Neil, who was the party who had this particular duty to look after. Neil then, as we consider, is shown to have been informed of the apprehended danger two days before the fall. Although there may be contradictory evidence on this part of the proof, it is clearly established that he had the particular spot of the danger pointed out to him, and yet his answer was (striking his stick against the seam), that he saw no present danger in the roof. Neil had denied this, but he admits that he was in the pit, and had the part pointed out to him on the occasion referred to, and he then gave directions to the people for certain things to be done towards propping up the If he gave directions to this effect he must have seen there was danger, yet he did not return to see if these instructions had been carried into effect. In this essential part of his duty he had There is no proof that Hardie had the chief superintendence in the underground workings of the pit. It is not stated by any one that he was the party whose duty it was to go about and seek out places of danger, and to guard against them. That was the duty The fault therefore lay with him, and the defenders were responsible for that fault. One defence stated was, that Hardie had a knowledge of the roof, and therefore ought not to have gone there; but that does not rest on any satisfactory evidence, but the evidence rather shows the contrary. The present case, therefore, cannot be brought under the case of Cook v. Bell, where the man was certiorated of the danger, and warned not to work in the stoop. Then, in the next place, it was said that the master was not responsible, because the injury was occasioned by the erection of a wall by a contractor employed to build it up to support the roof, but we have no evidence of that. Another ground stated was, that there was no responsibility, because the injury was occasioned by one fellow-servant to

ground manapit.

STIRLING or another. Such a doctrine can only be pleaded where two persons, HARDIE v. engaged by the same master, and on the same hire, on the same emADIE, MILLER, ployment, and the one is injured by the carelessness of the other.
Master held re-But here Neil was not a person standing in that position, and the sponsible for case does not raise that plea. The Court are therefore of opinion the negligence case does not raise that plea. of his under- that the interlocutor of the Lord Ordinary ought to be adhered to.

This case was settled; but the case of Lennan against the same deger in a coal-fenders. of a somewhat similar nature, was appealed to the House of Lords, and the judgment reversed.—See Lennan v. Adie and Miller,

afterwards reported under date 28th July 1859.

& RAILWAY Co. Railway and Canal Co. liable for negligent use of works.

MANBY v. St. 19-26th January 1858.—MANBY against THE St. Helens CANAL AND RAILWAY COMPANY.—27 L. J., Ex. p. 160.

> This was an action under the Act 9 and 10 Vict., c. 93. for reparation at the instance of a widow for the death of her husband, who was drowned in the canal by reason of the drawbridge, which continued the public road, having been open, and no fence along the edge to prevent the passengers on the road falling in. The deceased had been walking home during the night, and the bridge had been opened by some boatmen to let their boat through, but it had not passed through, and the bridge remained open, and in consequence the deceased fell into the water. There was no evidence that the deceased, through insobriety or otherwise, had contributed to his death. It was contended, however, that the owners of the boat were liable, and that the defendants were not. The Judge laid it down that the Company were bound to take reasonable precautions to prevent passengers from falling into the canal when the bridge was opened after dark; and he left it to the jury to say whether the deceased fell into the water through the want of due care on the part of the defendants, without fault on their part. The jury found for plaintiff, damages £750. viz., £500 for widow, and £250 for child.

> The defendants obtained a rule to enter the verdict for them, on the ground that the bridge was not at the time under the control of the defendants, or to arrest the judgment.—At the discussion.—

> MARTIN, B.—I only concurred in granting this rule on the ground that it might appear that the boatmen were responsible, but it now

plainly appears that they are not. The defendants are bound to MANBY v. THE maintain the bridges, and though they had authority to erect swing ST HELENS CANAL AND bridges, vet they were bound to maintain the bridges they did erect, RAILWAY Co. so as to prevent danger to passengers not avoidable by reasonable Railway and care. That is a common law duty consequent on their having Canal Co. liable for negligent erected the bridges, and on their being bound to maintain them use of works. They choose to erect a swing bridge, which, when opened, left the side of the canal exposed; and they left the bridge without a light. so that passengers at night might fall into the canal. The question was left to the jury, Whether the light was sufficient, and they found that it was not, and no other precautions were taken.

CHANNEL, B.—I reserved the question, Whether the action was maintainable against the company, with reference to the construction of their Act, and also as to the possible effect of a statutable authority to erect or construct works which might otherwise be a public nuisance.

The defendants farther contended that they were in a position analogous to that of trustees of turnpike roads, and, as such, were

not personally liable.

MARTIN. B.—The canal and bridges are the property of the company, and they make tolls for their own benefit. Their position is not at all analogous to that of trustees of turnpike roads, or other parties merely acting in a public capacity without any interest or right of property.

It was then submitted for defendants that on the principle of the case of The King v. Pease (4 B., and ad. 30), the canal and bridge were works authorised by an Act of Parliament, without any qualification or restriction, and the defendants are not responsible for any

risk arising from the lawful use of the bridge.

Pollock, C. B.—Provided there was no negligence in the manner of maintaining or using the bridge; but the jury have found negligence.

The Court discharged the rule.

Pollock, C. B.—This rule must be discharged for the reasons already thrown out in the course of argument. It is contended that the bridge was constructed by the company under the authority of an Act of Parliament, and that the defendants are parties in the same position as trustees of turnpike roads, or other persons merely performing public duties, and exercising powers with which they have been entrusted by the Legislature. But that is not so. They were the owners of the canal, and are to be treated as any trading company; and although, possibly, the Legislature permitted them to exercise these powers—a condition partly of benefit to the public, they do not the less exercise them for their own private benefit and profit. They are, therefore, personally responsible for the injury which arises from their not having done, or from their not having properly done, what they were bound to do. By this Act they are allowed to intersect highways, but they are to make bridges, and this must be taken to mean bridges proper and sufficient. They are not expressly authorised to construct swing bridges;

use of works.

MANBY v. THE and although such bridges might, a century ago, when the popula-ST HELENS tion was comparatively scanty, and traffic comparatively small, have CANAL AND been reasonable and proper, it may not be so now, when circum-Railway and stances in that respect have so altered. At all events, the precaucanal Co. liable tions which might have been sufficient to prevent danger to human applicant. life in the use of such bridges, may not be so now; and the jury were justified in finding that they were not so in this case, where it appears that a man had lost his life without any carelessness on his It appears to me clear that the defendants on that finding are responsible, and that there is no reason to question it.

M'KECHNIE v. 12th February 1858.—Colin M'KECHNIE, Pursuer, against Son. JAMES HENDERSON & SON, Defenders.—D. 20., p. 551. Liability for Jur., vol. 30, p. 297. injury by defective machinery.

> The pursuer was in the employment of the defenders. iron shipbuilders, at Renfrew, and was deprived of his sight while working at a punching machine. He pled that the injury was caused by the fault and negligence of the defenders, or others in their employment, for whom they are legally responsible, while the defenders maintained that the injury was the result of the pursuer's own negligence, recklessness, and inattention, and that they were consequently The action was raised in the Sheriff Court at not liable. Glasgow, and a proof was taken by both parties. peared that the pursuer, who was about twenty-one years of age, had been usually engaged in assisting in fixing the punches and bolsters used in the defenders' punching machines; and that, at the time of the accident, he had been desired to take out a punch and bolster, and replace them with others of a different description in one of the machines; and that, after he had done so, the machine was set in motion, and that as soon as the punch had descended into the bolster, a small splinter broke from the end of the punch, which struck the pursuer on his right eye, and deprived him of sight, and soon after he lost the sight of the other eye also. Sheriff-Substitute decerned for £500, which, on appeal, was reduced by the Sheriff to £400.

The case was advocated by the defenders. At advising,

The Lord President.—It is impossible to say that this case is M*Kechnie v. free from difficulty on the proof. The defence set up is that there Henderson & Son. was gross negligence on the part of the pursuer in not withdrawing Liability for the bite, which would have kept all safe. Now, upon this part of injury by defecthe case, there is a conflict of evidence, particularly on the question, tive machinery.

Whether this bitewas or was not in its place on that occasion. It is said if it had been kept out, there would have been as great risk, and it is said that this party deviated from the usual course, and that he had not the bite in when the injury occurred. I think the evidence on that point is in favour of the pursuer, and that he did not depart from the usual course in this respect. Then I think it is proved that the machine was old, that it had been repaired, that it wanted teeth, and that at the time the injury happened it was employed in the usual way. Therefore, there is no evidence that the injury arose

from the fault of the pursuer.

The following is the judgment of the Court:-- 'Advocate the 'case, and recal the interlocutors of the Inferior Court of 12th 'October and 13th November 1857. Find that it is sufficiently 'instructed as matter of facts: 1st, That, for some time previous 'to 22d May 1857, the pursuer, who was then about twentyone years of age, was in the employment of the defenders, and 'that it was part of his duty to assist Robert Kinloch in fix-'ing the punches and bolsters used in the defenders' punching ma-2d, That, on 23d May 1857, the pursuer was desired by 'the said Robert Kinloch to take out a punch and bolster and re-' place them with others of a different description in one of the de-'fenders' punching machines. 3d, That, after the pursuer had done 'so, the machine was set in motion, and that as soon as the punch ' had descended into the bolster, a small splinter, which broke from ' the end of the punch, struck the pursuer on his right eye, in con-'sequence of which he was immediately deprived of the sight of ' said eve, and either at the same time or soon after lost the sight of the other eye also. 4th, That at the time the pursuer received ' this injury, the punching machine, at which he was working, was 'in bad order; and the injury which the pursuer received was caused by the defective state of the said machine, which defective state ' was owing to the fault or culpable negligence of the defenders, or 'others for whom they are responsible. 5th, That in consequence 'of this injury the pursuer was rendered, and is now completely ' blind, and unable to work for his subsistence. 6th, That the pur-' suer's wages at the time was 10s. a week. Find that, in point of 'law, it is the duty of employers to keep the machinery which 'they use in good order, and that they are bound to make repara-'tion to their servants for any injury they may receive when em-' ployed by them at such machinery, if said injury has been caused ' by its defective state, and thereby, through the fault or culpable 'negligence of the employers, or of others, for whom they are re-'sponsible. Therefore decern, &c., for £400 in name of damages, ' with interest thereon, and expenses of process.'

GIBB v. THE TRUSTEES OF THE LIVER-POOL DOCKS. Dock trustees held liable for damages by unsafe state of harbour.

GIBB •. THE 23d February 1858.—GIBB against THE TRUSTEES OF THE TRUSTEES OF THE LIVER-LIVE

This was a writ of error, and was tried before Cockburn, C. J., J. Coleridge, Wightman, Cresswell, Williams, Crowder, and Crompton. It referred to the liability of dock trustees for damages caused to a vessel entering the docks at Liverpool—the ship having struck on a bank of mud at the entrance of the harbour. Judgment had been given for the defendants. The case was fully argued, and the judgment was reversed. The substance of the opinions of the Court is given by Justice Coleridge, who moved the reversal. He stated—

The plaintiff pursued for damages against the defendants for injuries caused to their ship, the Sierra Neveda, by the ship having struck on a bank of mud, lying in and about the entrance of the dock, as she was endeavouring to enter it. The only defence insisted on latterly was, that the defendants, being a corporation created by statute, and deriving no emolument from, or remuneration for, the performance of a statutory duty, and having a discretion as to the application of the funds received by them, could not be made liable in an action at law for not choosing to exercise their discretion at any particular time by spending the funds in removing the accumulation of mud; and the case of Metcalf v. Hetherington (24 L. J. Exch. Rep. 314 N. S.) was relied on as governing the present case. that case, the trustees of the harbour were sought to be made liable for the default of the harbour master, but it was held bad. decision has no application, because here it is not sought to make the trustees liable for any default but their own. In Metcalf there was a third count charging the trustees with negligence in the preservation and keeping of the harbour, and improperly suffering rubbish to accumulate therein, contrary to their duty, whereby it became unsafe, and the plaintiff's vessel being lawfully there, was thereby damaged. The Barons there held that this count was also bad in substance; 1st, Because there was no averment that the trustees had received funds wherewith to keep the harbour clear of rubbish; and, 2d, On the ground that the Legislature had reposed in them an absolute discretion (with certain exceptions) to dispose of the funds arising from the tolls in maintaining the harbour; so that, although the harbour wanted cleaning, they might apply the surplus in their hands to the repairs of the pier, to deepening the mouth and similar purposes, if they thought these objects were pressing, and of more advantage to the harbour than keeping the bottom The former of these grounds of decision does not apply to the present case, inasmuch as the declaration in this action does

contain an averment that the defendants had received sufficient GIBB v. THE funds; and it may be questioned whether the latter ground is not TRUSTERS OF THE LIVERalso inapplicable, because the declaration avers not merely that the POOL DOCKS. trustees had funds sufficient to enable them to remove the rubbish Dock trustees complained of, but also to perform their entire duty of maintaining, held liable for cleaning, supporting, and preserving the docks, in addition to the safe state of satisfaction of all other charges, liabilities and incumbrances in and harbour. about the same. It may be doubted, we think, whether, coupling this averment with the allegation of the knowledge of the trustees that the entries of the dock were dangerous, a state of facts is not shown under which they had a positive duty to perform, and not merely a discretion to exercise as to the removing of the danger. But, at all events, we think that if they had a discretion under the circumstances, to let the danger continue, they ought, as soon as thev knew of it, to have closed the dock to the public; and that they had no right, with the knowledge of its dangerous condition, to keep it open, and to invite the vessel in question into the peril, which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls to them, might enter and navigate the dock. The case of Parnaby v. The Lancaster Canal Co. (11 Ad. & Ellis, 223) establishes that the defendants would have been responsible, under such circumstances, if they had had a beneficial interest in the tolls when received; and we do not think the principle of that decision inapplicable because the defendants in the present case received the tolls as trustees. in our opinion, is equally cast on those who have the receipt of the tolls, and the possession and management of the dock, vested in them, to forbear from keeping it open for the public use of any one who chooses to navigate it on payment of the tolls, when they know it cannot be navigated without danger, whether the tolls are received for a beneficial or for a fiduciary purpose; and for the consequence of this breach of duty, we think they are responsible in an action. We are, therefore, of opinion that the judgment should be rescinded.

Judgment reversed.

21st April 1858.—WILLIAMS against CLOUGH.—27 L. J. WILLIAMS v. CLOUGH. Exch. Rep., p. 325. Relevancy of averments.

Action for expense of surgical attendance caused by injuries received by plaintiff, who was a servant for hire of plaintiff, and, while carrying corn for defendant up a ladder into a granary, fell from the ladder in consequence, as alleged, of its being unsafe and unfit for the purposes for which it was used. It was alleged that the plaintiff, believing the ladder to be fit and proper for the use and pur-

WILLIAMS r. CLOUGH. Relevancy of averments. pose aforesaid, and, not knowing the contrary, did carry corn up the same on the order of defendant, and, while carrying out that order, fell, and was rendered unfit for work. For defendant it was contended that the declaration disclosed no cause of action: it was consistent with the declaration that the plaintiff had notice that the ladder was unsafe, but that he believed the contrary, and therefore he may say that he knew nothing, although told of it. Moreover, this is a case in which the servant had as ample means of knowledge as his master.

Pollock, C. B.—We think the declaration good.

Martin, B.—It is not necessary to negative every possible state

of circumstances which may be an answer to the action.

Bramwell, B.—As at present advised, was of opinion that the defendant would not be liable if the plaintiff had the same opportunity of forming an opinion, although he came to an incorrect but honest one. If so, the declaration would be good, or not, as it produced that state of circumstances. He gave no opinion.

RUCK v. WILLIAMS. Improvement Commissioners liable for injury caused by imperfect state of drains.

6th May 1858.—Ruck against Williams.—L. J. 27, p. 357

Exch

Action against defendant, clerk to the Cheltenham Improvement Commissioners. The action was for damage arising to the property of plaintiff by the bad, defective, and improper manner in which sewers were constructed and kept: that they were continued in a defective state, and without due support, whereby, through the carelessness of the Commissioners, the sewer burst and overflowed, and the sewerage therefrom entered the pursuer's premises and did Defence, not guilty, and a denial that the Commissioners had the care and control of the sewers. peared that there had been for a considerable time a sewer near the plaintiff's property, and the plaintiff was the owner There communicated from his baths to this of baths. &c. sewer a private drain for the purpose of draining his pre-There was a flap to that drain, which prevented any backwater from the sewer being forced up into his premises In 1852, the Commissioners obtained an Act of Parliament and made new sewers; these were considerably deeper than the former ones, and a communication w

made from the drain from the plaintiff's premises into the sewer, but they omitted to make any flap. The work was Improvement given up to the Commissioners by the contractor as finished. Commissioners liable for injury A flood afterwards happened, and the puddling underneath caused by imthe river Chelt was washed away, and, in consequence of drains. the pressure of the water, it burst, and the stream of the Chelt was permitted to flow into the sewer. This caused damage to the plaintiff. B. Martin non-suited the plaintiff. on the state of the authorities, but gave leave to move to enter the verdict for the plaintiff.

The reason (says the Baron) I gave leave, was that there was a case pending in the Court of Error, Gibbs v. Liverpool Dock Trustees (ut supra), and it was supposed that the principle to be settled there would rule this case. The case has been since decided, but whether it would go this length, may be questionable. But two cases were quoted in argument yesterday (Ward v. Lee, 24 Law, J. (Q. B.) Rep. 142), which, although it cannot be said to be a judicial authority upon the point, yet it is as nearly so as a case can be. The action there was brought against a contractor, and Mr. Justice Wightman, in delivering the judgment of the Court of Queen's Bench, that the contractor was not liable, showed distinctly that the Commissioners of the Board of Health were: their Act of Parliament incorporated the Public Health Act, and the words were identical with the words relied on in the present case. There is another case, The Itchen Bridge Co. v. The Local Board of Health of Southampton, L. J., vol. 27, p. 128, which seems to establish beyond all manner of doubt that there is a liability on the Commissioners to damages when they are enabled to reimburse themselves out of the rates for any consequences of acts done by them in the course of draining, which they are authorised by an Act of Parliament to do, and we consider ourselves bound by that case; and we hold, therefore, that the Commissioners are liable. Leave was given to enter the verdict for £120.

10th June 1858.—Waite, Plaintiff, against North-Eas-Waite v. North-East-tern Railway Company, Defendants.—Law Journal, 27. ERN RAIL. Co. Queen's Bench Rep. 417.

This was an action of damages for injury to a child five dian in a quesyears of age, who, along with his grandmother, had been gence. passengers by the Railway. In January 1857 the grandmother, Mrs. Park, took a ticket for herself and a half ticket for the child, at the Velvet Hall Station of the defendants'

Negligence in child identified with its guarNegligence in with its guartion of negligence.

Railway to Tweedmouth. There was only one person em-ERN BAIL Co. ployed about the railway, although there was a considerable goods traffic at the station. This person, after having given child identified the tickets, left the booking-office for the goods-shed, having dian in a ques-told Mrs. Park that her train would be up in a quarter of They went into the waiting-room. an hour The bookingoffice and other station buildings are all on one side of the line, and persons intending to go by the train to Tweedmouth have to cross to the opposite side of the line. is generally done by crossing the line of rails when the train is in sight, on the attendant requesting the passengers to do Soon after the attendant left Mrs. Park, a goods train, also going towards Tweedmouth, but not stopping at the station, came up, and after it had passed Mrs. Park was found on the line killed, and the plaintiff much hurt. was conjectured that Mrs. Park had taken the goods train for the passenger train, and had been knocked down in attempting to cross. The engine drawing the goods train was driven with its tender first, so that the driver was not in a good position to observe the plaintiff and Mrs. Park. The Judge (B. Martin) told the jury that, in order to find a verdict for the plaintiff, they must be satisfied that there was negligence or default in the servants of the Company in managing the station, or in driving the engine. was no negligence on their part, or if the person injured conduced, by his own rashness, to the accident, then the defenders are not responsible. There was also the new question, as to how far the plaintiff himself, being so young a child, could be said to be guilty of negligence; and he was not prepared to say, if there was negligence on the part of the defendants and of Mrs. Park, and no negligence of the child himself he was not entitled to recover. Judge, after commenting on the evidence, left two questions to the jury. First, Was there negligence in the servants managing the station, or engine? And, secondly, Was there negligence in Mrs. Park only? directing them, if they found negligence in the defendants' servants, to say what damage The jury found for the plainthe pursuer was entitled to. tiff damages £20. The defendants had leave to enter a non-The Court granted a rule nisi to enter the verdict

for the defendants on all the issues, on the ground that the WATTE U. NORTH-EASTnegligence of Mrs. Park, as found by the jury, entitle the RRN RAIL Co. defendants to the verdict, or for a new trial, on the ground Negligence in plaintif—s that the direction of the Judge respecting the negligence of child identified Mrs. Park was not correct. The plaintiff showed cause, and the dian in a quescase was argued.—Judgment was pronounced for defendants, gence.

LORD CAMPBELL, C. J.—In this case we think the rule ought to be made absolute for entering a verdict for the defendants, or for a non-The jury must be taken to have found, that Mrs. Park, the grandmother of the infant plaintiff, in whose care he was when the accident happened, was guilty of negligence, without which the accident would not have happened; and that, notwithstanding the negligence of the defendants, if she had acted upon this occasion with ordinary caution and prudence, neither she herself nor the infant would have suffered. Under such circumstances, had she survived, she could not have maintained any action against the Company; and we think the infant is so identified with her, that the action in his own name cannot be maintained. The relation of master and servant certainly did not subsist between the grandchild and the grandmother, and she cannot in any sense be considered as his agent; but we think that the defendant, in furnishing the ticket to the one and the half-ticket to the other, did not incur a greater liability towards the grandchild than towards the grandmother, and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild. We do not consider it necessary to offer any opinion as to recent cases, in which passengers by coaches, or by ships, have brought actions for damages, suffered from the negligent management of other coaches and ships, there being negligence in the management of the coaches and ships, by which they were travelling; as, at all events, a complete identification seems to us to be constituted between the plaintiff and the person whose negligence contributed to the damage which is the alleged cause of the action, in the same manner as if the plaintiff had been a baby only a few days old, to be carried in the nurse's arms.—Rule absolute for a nonsuit.

15th June 1858.—DALZELL, Pursuer, against TYREE and DALZELL V. TYREE AND Others, Defenders.—28 L. J. (Q. B.) p. 53.

OTHERS. Owner liable The the vessel.

The lessee of a Ferry hired of the defendant for the day, of the crew, and not the hirer of a steamer, with a crew, to carry his passengers across. pursuer having paid his fare to H., passed across to the steamer, and while on board, was injured by the breaking of a rope, owing to negligence of the crew in the manner of

DATZELL T TYREE AND OTHERS. not the hirer of the vessel.

Held, that the crew remained the servants of the mooring. defendants, who were therefore liable for the negligence: Owner liable and that as the negligence was such as would have made of the crew, and the defendants liable to a mere stranger, and the plaintiff was on board with their consent, it was unessential that he was a passenger under a contract with H.

GRIFFITHS v. GIDLAW A workman. from his know ledge of the circumate need precluded from claiming damages.

1st July 1858.—GRIFFITHS, Plaintiff, against GIDLAW. Defendant.—27 L J. Ex., p. 405.

Action of damage for injuries sustained by plaintiff, a labourer in the employment of defendant. The plaintiff was employed in sinking a shaft to the depth of sixty feet. The water and earth were taken up by a barrel, and it was under the care of the defendant's servants. The plaintiff was at the bottom of the shaft. There was a 'giddy' provided by defendant, to put on the barrel when water was taken up, in order to prevent any from falling out and plaintiff had sixpence a-day extra to look after the giddy. The giddy was not used when water was taken up. barrel had just reached the top when it fell down on the There was evidence that the hooks by which the plaintiff. barrel had been attached to the chain were out of order, but the pursuer had taken part in fixing it. The men at the top stated that there was no negligence on their part. was evidence that the place where the chain was wound at the top had become worn.

For the defendant it was contended, that there was no liability from negligence of the plaintiff's fellow-servants.

The declaration was amended, by allowing the plaintiff to state that the defendant was guilty of personal negligence.

The Judge told the jury that defendant would be liable if insufficient machinery or materials were used by his orders. or dangerous processes or modes of operation, such as the habitual disuse of the giddy.

The jury found for plaintiff.

A rule nisi was obtained to set aside the verdict, and for a new trial, on the ground of misdirection, in this, that the Judge should have told the jury that if the plaintiff knew

that the machinery employed was insufficient, or the pro- GRIFFITHS v. cesses pursued unsafe, and notwithstanding such knowledge, A workman, continued his employment, he could not recover, and to ledge of the circles amend the second plea by striking out the words, 'limiting cumstances, it to the negligence of the defendant's servants.'

precluded from claiming damages.

WATSON, B. delivered judgment. It is admitted for plaintiff, that it has been settled by all the Courts in Westminster Hall that a master is not responsible for an injury sustained by a servant from the mere negligence of a fellow-servant engaged in the some employ-The Court of Exchequer, in Roberts v. Smith, has decided that it is the master's duty, where he personally interferes, to take care to provide that the tackle and apparatus employed by him is proper and secure, and that he is liable in damage caused by the want of due care in this respect. The same principle was laid down in Paterson v. Wallace, as existing in the law of Scotland; and it was sought to bring the present case within that, by two circumstances. The first was, that evidence was given that the hook by which the barrel was attached to the tackle which drew it up was not safe, and that there ought to have been a spring-hook on the inside, which would have prevented the misfortune which led to the accident. The answer to this seems to us to be, that the plaintiff himself knew that the hook which was used, and worked by himself, was not attached to the tub or barrel that afterwards fell upon him; and he seems to have made no observation or complaint in any respect about it. think that a servant so acting cannot maintain action against his employer; he himself was contributing to the injury. The second circumstance relied on was, that the 'giddy' was not used. It is proved that the defendant had supplied a 'giddy,' for the purpose of being placed on the top of the pit, where the tub was emptied, and it was used when coal or earth was brought up, but not water. proved that defendant was in the habit of coming to the place where the pit was sinking several times a-day. We think the defendant is not rendered liable by these circumstances. He had applied a proper apparatus, and the plaintiff's fellow-workman neglected to use it. There is no evidence that the defendant had given any direction to this effect; and it seems that, to hold the defendant liable, would be utterly to fritter away the rule, that a master is not responsible for injury caused to one servant by the negligence of another. Court unanimously found for defendant.—Rule made absolute.

4th November 1858.—BIRD, Plaintiff, against THE GREAT BIRD v. THE NORTHERN RAILWAY, Defendants.—28 L. J. Ex. Rep. ERN RAIL. Co. Negligence, on which side lies

This was an action for injury, alleged to arise from the the proof of it? negligence of the Company in the care and management of

BIRD v. THE the line. Defence-Not guilty. At the trial, it appeared Great North-ern Rail. Co. that the engine, on the occasion in question, had suddenly Negligence, on gone off the line, at a spot to which the process of 'fishing' which side lies gone off the line, at a spot to which the process of 'fishing' the proof of it? the rails, which was being carried on above and below that spot, had not been extended. It was admitted that this process was an improvement, but it also appeared that it had only of late been introduced, and on a great portion of the railways it had not been carried out. There was a great deal of evidence on both sides as to negligence. L. C. Baron left the evidence to the jury, who found 'for the ' defendants, because there was not sufficient evidence as to 'cause of the accident.' Plaintiff moved for a new trial, on the ground of misdirection, in that the jury were not told that there was a prima facie case of negligence, and that, if it was not satisfactorily answered by the defendants, the verdict should be for the plaintiff. The occurrence of the injury itself is prima facie proof of negligence. The case of Carfrae v. London and North Western Railway was

Pollock, C. B.—That depends on the nature of the accident; as, for instance, if it arises from a collision of different trains on the same line, then it may be so. Here it is otherwise: the accident was of a nature consistent with the absence of negligence—(Skinner v. London and Brighton Railway. 5 Exch. Rep. 787. 19 L. J., Exch. 162). It was further maintained by plaintiff, that he had given as much evidence of negligence as a passenger possibly would who necessarily must be unable to ascertain the cause of an accident; and the Railway being entirely under the control of the Company's servants, the onus probandi was thrown upon the defendants, so that if they failed satisfactorily to show that there was no negligence, the plaintiff was entitled to the verdict.

POLLOCK, C. B.—It was for the plaintiff to prove negligence; the defendants' undertaking was, not to carry safely, but to carry with reasonable care. They are not, as carriers of goods, insurers; there-

fore the burden of proof was on the plaintiff.

By Court.—The whole question was left to the jury, and the meaning of their finding was, that they could not find for the plaintiff; in effect, that he had not proved that the accident arose from negligence. It is impossible to say that the accident itself, even if prima facie proof of negligence, was conclusive proof of it; and if not, then, as there was evidence on both sides, the question was for the jury; and their finding was substantially a finding for the defendants, on the ground that there was no negligence.

Rule refused.

referred to.

18th December 1858.—SAMUEL KERR, Pursuer, against KERR THE MAGISTRATES OF STIRLING, Defenders.—D. 21, p. of Stirling, 169. 31 Jur., p. 100.

t Kerr e The
MAGESTRATES
Liability of
Magistrates as
regards public
roads within
burgh—Proprictors' liability for insufficient force.

The pursuer brought an action for solatium for the death burgh-Proof his son, under the following circumstances:—He alleged hity for insuffithat there existed a footpath leading from the Craigs of cient fence. Stirling along the side of the mill lade and dam of the burgh of Stirling, onwards to the street called Murray Place; that the road in question was a public road, and been from time immemorial as such. It is within the burgh of Stirling, and, at least the northern part of it, the property of the defenders, as representing the community of said burgh: or, at all events, it was a public thoroughfare within the control and management of the defenders, and which they were bound to see kept so as to prevent danger to passengers; that it was recognised and dealt with by the defenders as a public road; they altered and repaired the road, and a stone wall of about 41 feet in breadth formed a continuation of the road for about 36 feet along the dam: the footpath at the top of the said wall is about 3 feet above the level of the water in the dam, and there was a sharp turn or angle in the wall. No fence or other erection existed between the said footpath or road and the dam. That, on 21st October, in the evening, and while it was dark, the pursuer's son, while proceeding along said footpath, missed his foot on the top of said wall, fell into the dam, and was drowned.

The action was against the defenders, the Provost, Bailies, and Town Council, representing the community thereof in regard to all burghal, municipal, and police matters whatsoever; and also against them, as owners in trust for behoof of the said community, of the mill dam of the said burgh, and representing the community in regard to the said property.

The defence was a denial that the walk had been recognised and dealt with by them as a public road, and a statement that "the bank of the mill lade and mill dam, though often used as a walk, is not at any place along its course

KERR v. THE one of the public streets or roads of the burgh of Stirling. Liability of Magistrates as not to serve as a road, but for purposes connected with the regards public mill.

Parties differed as to the form of the issue. Logan, for burgh—Proprietors' liability for insuffic pursuers, in order to obviate an objection, was prepared to put in issue whether this thoroughfare was under the control of the defenders, and dangerous for passengers through He maintained that the case of the want of proper fences. Innes established that Magistrates have a general charge of everything connected with the streets necessary for the safety of passengers; and, in the case of Dargie, it was laid down that a general duty attached to them, extending over every path within the burgh used and frequented by the community of the burgh as a public thoroughfare.

> LORD DEAS.—There is no allegation that, in point of fact, the Magistrates, as such, ever took possession of, or dealt with that road as a public road. I doubt whether it is enough to say that it is a public road, and whether it must not also be averred that the Magistrates have taken possession of it as such.

> LORD PRESIDENT.—The defenders deny that this place had been dealt with by them as a public road, and there is not on record any allegation of obligation on the Magistrates to keep this road in repair.

> LORD CURRICHILL.—The pursuer is stating very important doctrine, that every public thoroughfare, although a mere footpath, within the bounds of the burgh, is under the charge of the Magistrates, who are responsible for maintaining it in proper order. That may be so; but I am not aware of any authority for that proposi-The case of Innes and the case of Dargie both referred to public streets.

> LORD IVORY.—This is raising a very large and a very delicate question, indeed, which, when last before the House of Lords, gave rise to a very great deal of observation. The Magistrates may, as administrators for the community, be proprietors of the ground, in which case their liabilities are just those of ordinary proprietors: that is to say, for the street, whether within burgh or not, they are subject to the same liabilities with any proprietor. Their liabilities in that character are totally different from those they may be under in respect of their public duty-qua Magistrates of the burgh.

The following issue was approved of:—

' It being admitted that the defenders are proprietors of ' the burgh mill of Stirling, and the mill dam thereto per-' taining-Whether, on or about the night of the 21st Octo-

- ' ber 1856, the now deceased Samuel Kerr, son of the pur-Kerr v. The 'suer, when passing along a footpath leading from the of Stirling. 'Craigs of Stirling to Murray Place, in the burgh of Stirling, Magistrates as ' along the banks of the mill lade and mill dam of the burgh regards public roads within ' mill of Stirling, and when at a point thereof, which skirts burgh—Pro-
- the north side of the burgh mill dam, fell into the said prietors' liabi-' dam and was drowned through the fault of the defenders, cient fence.
- 'in not having, as proprietors of the said burgh mill, and
- of the dam thereto pertaining, duly fenced the said dam.
- ' to the loss, injury, and damage of the pursuer. Damages
- ' laid at £300."

13th January 1859.—Senior v. Ward.—28 L. J. (Q. B.), Senior v. 139.

Coal-pit accirashness on the

An action by the mother to recover damages for the injured party death of her son, John Senior, who, with his two brothers buting to the and another person, were killed in descending to a coal pit injury held to bar damages. belonging to and managed by the defendant, in whose em-The rope by which they ployment they were at the time. were descending broke and caused the injury. special rules framed for the regulation of the colliery, and In one of these rules it is propublished at the work. vided that every morning, in order to test the engine, machinery, and ropes, &c., the engineer should cause the ropes and loaded cages to be run slowly twice up and down the pit before any person descends, and the head banksman should not allow any person to descend or ascend the pit until this had been done, and the ropes, cappings, and cages had been carefully examined by him.

This rule had been entirely neglected by the engineman and banksman to the defendant's knowledge for many weeks The deceased were all above eighteen before the accident. years of age, and knew that this rule was habitually violated.

On 5th January 1858, a fire occurred accidentally at the colliery, and by it, as was ascertained after examination, the rope by which the cage was worked up and down the shaft of the mine, having been before in good condition, was in

WARD. buting to the injury held to bar damages.

iured. The next morning John Senior and the others pre-Coal-pit acci- sented themselves at the pit-mouth, in order to go down to dent-Fault or their work (there having been no previous testing of the injured party rope according to the rules.) The banksman told them directly contrithey had better examine the rope before they went down. They disregarded this warning, and got into the cage imme-The rope broke in the descent, and all were diately. The jury returned a verdict for pursuer for £80. killed. with leave to move to enter the verdict for defendant, or for a non-suit. Other two actions were to abide the result.

> A rule nisi was obtained to enter the verdict for defendant, or a non-suit, or for a new trial, on the ground that the negligence which occasioned the death of the plaintiff's son, was not the negligence of the master but of a fellowworkman, not shown to have been incompetent for the discharge of the duties devolved on him.

Lord Campbell, C. J., delivered the judgment.

We are of opinion that the rule to enter the verdict in this case for the defendant, or to enter a non-suit, must be made absolute.

The authorities on this subject are all collected and commented upon in the Bartonshill Coal Co. v. Reid. According to these authorities, the action would not have been maintainable if the deceased had come to his death purely from the negligence of his fellow-servants employed in the same works with him. However, a strong case of negligence on the part of the defendant as contributing to the death has been made out; and if an answer had not been given to this case, by showing negligence on the part of the deceased, which contributed to his death, we think that the defendant ought to have been found liable. After the passing of the Act 18 and 19 Vict., c. 108, for the inspection of coal mines, special rules were framed and duly approved of for the regulation of the defendant's colliery; and by one of these rules it was provided that every morning, before the miners were let down the shaft into the mine, the cage by which they were to descend should be let down and pulled up again, heavily loaded, to test the sufficiency of the rope and the tackling. But the defendant who superintended the working of his colliery, instead of enforcing this rule, allowed it to be entirely neglected by his workmen for many weeks before the accident happened which caused the death of the deceased. The night before the accident, the rope by which the cage was suspended, being then in good condition, was injured by an accidental fire in the colliery. Next morning the deceased and other miners were let down the shaft without any testing of the rope and tackling. If that testing had taken place the insufficiency of the rope would have been discovered, and the men would all have been saved, but the rope broke and the deceased and other men were killed on the spot. There was most culpable negligence

on the part of the defendant in neglecting the rule, and in keeping in his employment a banksman who he knew habitually disregarded Warnit. Looking to these acts only, although the banksman was the dent-Fault or fellow-servant of the deceased, and both the deceased and he were rashness on the employed by the defendant in the colliery as fellow-labourers, we injured party should have held the defendant liable, his negligence having mate-buting to the rially contributed to the death of the deceased. But, according to injury held to the report of the learned judge who tried the cause, it was further bar damages. in evidence that gross negligence was to be imputed to the deceased himself, and that his negligence materially contributed to his death. With the exercise of ordinary prudence, he would have escaped the danger, and his life would have been saved. He knew the rule for testing the rope and tackling every morning, and he knew that this rule was habitually violated; farther, on the morning of the accident he and the other miners were told by the banksman that they had better examine the rope before they went down. Nevertheless, they disregarded this warning; immediately getting into the cage, the rope broke as they descended, and they were killed.

We conceive that the Legislature on passing the statute on which this action is brought, intended to give an action to the representatives of a person killed by negligence, only when, had he survived, he himself, at common law, could have maintained an action against the person guilty of the alleged negligence. Under the circumstances of the case, could the deceased have maintained an action against the defendant for what he suffered from the accident? We think that he could not, for although the negligence of the defendant might have been an answer to the defence that the accident was chiefly caused by the negligence of a fellow-servant—the negligence of the plaintiff himself, which materially contributed to the accident-would, upon well-established principles, have deprived him of any remedy-volenti non fit injuria.

Judgment for defendant. Rule absolute.

21st January 1859.—HARDCASTLE, Plaintiff, against South HARDCASTLE r. 28 L J, SOUTH YORK-YORKSHIRE RAILWAY COMPANY, Defendants. Excheq. 139.

This was an action under 9 and 10 Vict., c. 93, for compensation for the death of the plaintiff's husband, caused holes at some through the alleged positions of the strength through the alleged negligence of the defendants. defendants' predecessors had made a cut from a canal now against the probelonging to defendants, which consisted of a large reser-prictor-In voir, out of which there were two branches—one a canal public nui-for boats to navigate, and the other a bye-wash or cut for the surplus waters to flow away. There was an ancient

Parties sus-The public path,

WAY Co.

WAY Co. Parties susopen pits or holes at some public path, have no claim prietor - Is such place a public nui-

HARDCASTLE v. footpath from Rotherham to Sheffield which passed along SOUTH YORK- shire Rail- the bye-wash, was continued over it by a bridge, and then proceeded to Sheffield. The interjecting ground had also taining injury to be crossed. The bridge was from seven to ten yards by falling into from the end of the buttress or projecting wall, and a pernotes at some distance from a son who continued to walk straight up the pathway along the bye-wash, and who did not turn a little to the right in against the pro-order to go over the bridge, would, unless prevented by the arm of a gate to a lock upon the canal gate, come upon a grass plot, and if he continued walking on would go over the buttress or projecting wall into the reservoir. It was assumed that in this way the deceased met his death. jury found for the plaintiff, and the defendants had leave to move to enter the verdict for them. The plaintiff contended that the defendants made the reservoir and the right of way then subsisting; and they made it adjoining the way. in fact diverting the way for the purpose, and they were bound to fence the reservoir so as to guard against the almost unavoidable danger of persons passing along the way in the original direction, and thereby walking into the water, and they referred to Barnes v. Ward, 9 Com. B. rep. 392. The defendants denied that the case cited was in point, for there the declaration was that the hole was "abutting upon" the road. Here that could not be truly alleged, nor indeed was the reservoir adjoining the way in the sense in which that word must be construed to make the declaration good. The reservoir was some yards from the way: it was no part of the defendants' duty to guard against persons straying from the way.

> B. Martin.—After such a lapse of time, we think it must be taken that the present way is the lawful one. The authority relied on by plaintiff was Barnes v. Ward, and with the judgment in that case we entirely concur. The facts there were that the defendant, being possessed of land abutting on a public footpath, excavated an area in the course of building a house immediately adjoining the footpath, and left it unprotected, and a person walking in the night-time fell in and was killed. The Court held that the defendant was liable; the principle of that decision was that such an excavation was a public nuisance, and that an individual injury arising from such a nuisance was the subject-matter of an action to the party aggrieved. That a private injury arising from a public nuisance is the subject-matter of an action for damages, is

a doctrine as old as any in the common law; and if we were of Harmonstray. opinion that the state of the reservoir in the present case was a Sorth York-nuisance to the footpath, and that the plaintiff was substantially way to in the right, not with standing that we thought the terms of the de Parties sus claration defective, and that there was no such obligation to fence as mining injury then alleged, redress might have been given; but we are of opinion over that she has no right of action against the defendants. When an holes at some excavation is made adjoining to a public way, so that a person making a false step, or being affected with have no claim: sudden giddiness, or in the case of a horse or carriage who might, against the probability by the sudden starting of a horse, be thrown into the excuration such place a it is reasonable that the person making such excavation should be public nailiable for the consequences; but when the excavation is made at same? some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different. We do not see where the liability is to stop. A man going off a road in a dark night, and losing his way, may wander to any extent; and if the question be for the jury, no one can tell whether he was liable for the consequence of his acts upon his own land or not. We think the proper and true test of legal liability is whether the excavation be substantially adjoining the way, and it would be very dangerous if it would be otherwise: and if in any case it was to be left as a fact to the jury whether the excavation was sufficiently near to the highway to be dangerous. When a man dedicates a way to the public, there does not seem any just grounds in reason and good sense that he should restrict himself in the use of his land adjoining to any extent farther than that he should not make the use of the way dangerous to the persons who are upon it and using it. To do so would be derogating from his grant, but he gives no liberty or license to the persons using the way to trespass upon his adjoining land; and if, in so doing, they come to misfortune, we think they must bear it, and the owner of the land is not responsible. If fences are to be put up, it would seem more reasonable they should be put up by those who use the way, or those who are under the obligation to repair it, than by the person who dedicates it to the public; and as we are clearly of opinion that there is no such obligation to fence, as alleged in the declaration, and also that upon the above state of facts there is no liability, our judgment is in accordance with the principleof the case of Blyth v. Toplin, 19 Law J. (C. P.), 197, The rule to enter a verdict for which, we think, is the true one. the defendants must, therefore, be made absolute.

Verdict entered for defendants.

BIRKETT r.
WHITEHAVEN
JUNCTION
RAILWAY Co.
Liabilityfor negligence.

to recover.

2d June 1859.—BIRKETT, Plaintiff, against WHITEHAVEN JUNCTION RAILWAY Co., Defendants.—28 L.J. Exch. 349.

The defendants had undertaken to carry a passenger to Their line ended at Maryport, and their train, on arriving there, came into collision with some coal waggons. owing to the careless management of a 'switch.' defendants paid rent for the use of the station with the The siding on which the waggons were, and which the switch worked, was for the traffic of the The 'switch' was self-acting, and there was defendants. no one in charge of it: but the defendants had a servant close by, for the purpose of looking after some gates, and he could, and sometimes did, see if the 'switch' was working rightly. The passenger being killed in consequence of the collision, and the jury having found the defendants guilty of negligence, Held, that there was evidence to sustain the verdict; and, opinion, that had the negligence been that of the other Company, the defendants would have been liable.

Duckworth v. 4th June 1859.—Duckworth, Plaintiff, against Johnston, Proof of damage to entitle

Defendant.—29 L J. C. P., p. 25.

This was an action by a father to recover compensation for the death of his son, aged about fourteen years. The Court held that action could not be maintained by the representatives of a deceased person under the Act 9 and 10 Vict., c. 93, without proof of actual damage to the parties on whose behalf the action is brought. The mere proof, therefore, of the death by negligence, does not entitle the executor or administrator to a verdict of nominal damages. The deceased was son of a mason, and earned 4s. a-week, which was applied by his father and mother to the general support of the family, of which he was a member. No evidence was given as to whether the sum earned exceeded or was less than his actual cost of maintenance. The jury having found a verdict for the plaintiff, £20 damages, (£1)

to father, and £10 to the mother), the Court refused to Duckworth v. disturb the verdict under the circumstances. They considered it was probable that there was a balance on the boy's wages every week after deducting his board, and that it had been decided that the prospect of benefit to the parent from his future exertions might be taken into view by the jury in disposing of such questions.

28th July 1859.—OWEN LENNAN, Pursuer, against Addie Lennan v. and MILLER, Defenders.—D. 21, p. 1382.

ADDIE AND MILLER. Non-liability of

The pursuer was reddsman or labourer in a coal-pit juries caused to belonging to the defenders, and was injured by the fall of a servant, the He was in fault or neglistone from the roof of a main road in the pit. gence of fellow the employment of the defenders, and at the time of the servants. injury he was employed in redding the said main road. libelled that the fall was 'occasioned by the gross negligence ' and indifference of the defenders, or of their managers and ' others, for whom they are responsible, in not gearing and ' properly securing the roof of the said main road.'

The Sheriff (Alison), altering a judgment of the Sheriffsubstitute (Tennant), found the pursuer entitled to £100 The defenders advocated, pleading, inter alia, That even assuming that some parties in the employment of the advocators, other than the pursuer himself, were bound to have done what would have prevented the accident, the failure being on the part of fellow-workmen of the respondent, in the advocators' service, cannot infer legal liability against the advocators. The Lord Ordinary agreed with the Sheriff; and, on a Reclaiming Note, the Court, on 19th June 1857, adhered. The facts, as embodied in the interlocutor of the Lord Ordinary, were,—(1.) That on or about the 26th July 1855, the respondent, whilst working in a coal-pit of the advocators', was severely injured by the fall of a stone from the roof of a drawing-road, which rendered it necessary that his leg should be amputated. That the roof of the said road, at the place where the accident happened, was of a dangerous character, being composed of a thick bed of blaise, in which stones were embedded, and

LENNAN E. Addie and MILLER, a servant, through the servants.

that at the place repeated falls had happened shortly before the accident. (3.) That no sufficient means had been Non-liability of adopted by the advocators' servants, whose duty it was to juries caused to secure the roofs of the roads in the pit, to gear or otherwise secure this dangerous part of the road at the time when the through the secure this dangerous part of the road at the time when the fault or negligence of fellow accident happened. (4.) That a few hours before the accident happened a fall had taken place in this part of the roof, and that the accident happened to the respondent when engaged in clearing away the stuff that had thus fallen. (5.) That the respondent had been ordered to do this work by Samuel M'Lachlan, a brusher in the advocators' employment, without any precautions having been taken by M'Lachlan to guard against the danger of another fall from the same place. Finds, in point of law. That the advocators are responsible for the negligence of these servants. above set forth, and liable to make reparation to the respondent for the injury sustained by the said accident.

> LORD JUSTICE-CLERK (HOPE).—This leading fact is established. that there was a dangerous roof over the spot in question. The spot in question was known to be a dangerous part of the roof; two falls had taken place close to the stone which occasioned the accident within a week, and a fall had occurred that very morning at this very place. The pursuer is sent to work there; when he is working the stone fell. The block was known to be there, and had been thought 'quiet,' and so was allowed to remain. It had been looked to and chapped, the strongest proof that the defenders' people were either 'unskilled,' or did not care to protect themselves against danger.

> It is said in defence that it was the pursuer's duty to look to this. The answer is clear—there never was attached to the pursuer the real responsibility attaching to the position of reddsman. He was told that he had been promoted to that situation; but the precise time for his entering upon it had not come. He was told he was to get it with more pay; but no change was made upon its amount until after the accident, so it cannot be said that he was a reddsman at the time. The duty the pursuer was performing does not necessarily imply that he was a reddsman; and his superior had very shortly before looked at the place,—a fact of which he was This man had neither the responsibility nor the duty of a aware. reddsman.

The other judges concurred.

The case was appealed to the House of Lords, and disposed of ex parte.—The judgment of the Court of Session was reversed on 29th July 1859.

METCALF, Plaintiff, against HETHERINGTON, Defendant, 8 W. R. 475.

METCALE P. HETHERING-TON. Harbour Trustees)

In an action for negligence, against Trustees of a Har-Circumstances bour, sued through their clerk, it was proved that some liability on rubbish had been shot into a berth in the harbour, without trustees. the privity of the Trustees, who directed their clerk to cause it to be removed, and interfered no farther, and had no further knowledge in the matter: that the removal was insufficiently done at their expense, leaving the harbour unsafe; that afterwards the harbour-master, not knowing that the berth was then unsafe, but knowing its original state, and what had and what had not been done, directed the vessel, alleged to have been damaged by the negligence of the defendants, to be placed in the berth, where she was placed accordingly, and suffered injury. Held, That there was no evidence of negligence on the part of the Trustees.

24th December 1859.—MACINTYRE, Advocator, against M.Intyre v. REILLY, Respondent.—32 Jur., p. 143.

REILLY. Circumstances where no culpa

· The respondent was employed as a labourer by the advo-held on emcator in taking down some old brickwork connected with a During the operations the flooring gave way, and Reilly was injured. He raised an action against M'Intyre, and the Sheriff of Glasgow found damages due, holding that there was a certain amount of negligence on his part, or those for whom he was responsible, in the manner in which the taking down of the brick work was gone about, and in omitting to put up props in the course of the operations. In an advocation the Court recalled the Sheriff's judgment, and assoilzied the employer.

LORD PRESIDENT was of opinion that the circumstances did not show any culpa on the employer's part. 'The flooring previously 'supported a boiler of great weight, and it is after its removal that 'the occurrence took place. The evidence did not show that there was any possible mode of preventing it. The suggestion of the ' possibility of introducing pieces of wood through the furnace bars 'as props was no doubt very ingenious; but as nothing happens

' without a cause, perhaps no accident ever occurred as to which sug-'gestions might not be afterwards made by which it might have ' been prevented. The question for the Court was, Whether there was any indication of danger, such as demanded or suggested pre-' cautions which were omitted; and whether there was, on the part ' of the employer, any negligence or want of due care or caution in ' his proceedings? Looking at the whole case, he did not find any 'evidence to that effect; and on these grounds the Court were of 'opinion that the pursuer had failed to prove his case.'

Circumstances where no lia-bility held on employer as to ventilation and

GRAY & Co. S. 8th February 1860.—ROBERT GRAY and Co., Advocators, against DAVID LAWSON, Respondent.—32 Jur., p. 274.

The respondent, Lawson, was permanently injured while inspection of working in a coal-pit, caused by an explosion of fire-damp, real mine—no negligence on and he claimed reparation against his employers. They had given him some pecuniary assistance while confined to the The Sheriff-substitute assoilzied: but the Sheriff altered, and found £40 of damages. In an advocation the Court recalled the decerniture, and assoilzied.

> LORD PRESIDENT.—'I think the respondent has failed to establish that there was any fault on the part of the advocator. ' ventilation of the mine, the evidence shows that the apparatus was 'complete; and as to the want of attention to it, the evidence was 'very imperfect. It is not enough to say that, in the opinion of ' some people, there were not a sufficient number of persons to attend ' to the ventilating doors. That is not enough, for there is a differ-' ence of opinion about that. It appears there was an inspection of the mine by the fireman in the morning, and he ascertained its ' condition then. It is not alleged that his inspection was imperfect, but the injury is said to have resulted from some negligence that 'occurred at a subsequent period of the day. I have tried to find 'out what that negligence was, and I have tried in vain.' His Lordship stated that the parties and the Sheriff differ in their theories as to the cause of the accident, and that, in his opinion, the workman was guilty of rashness, having been warned of the danger, and exposed himself to the hazard. He then proceeds: 'While, ' therefore, there is a failure to establish blame on the part of the ' master, there is evidence of blame on the part of the respondent ' himself. In that view of the matter, it is unnecessary to go into the question as to the amount of blame, or the nature of it, or how it ' contributed directly or indirectly to the injury. It is also unne-' cessary to go into the question, whether the persons underground were persons for whom the master was responsible. I can conceive ' questions of considerable difficulty to arise there; but a settlement of these difficulties is not necessary for the decision of this case.'

9th March 1860.-Thomas Brownlie, Advocator, against Brownlie v. JAMES M'AULEY. Respondent. 32 Jur., p. 415. D. p. Master held

liable for in-

The respondent, James M'Auley, raised an action in the scaffolding, and Sheriff Court. Glasgow, against the advocator-defender, for by the incomdamages, in respect that while employed as a labourer by foreman. the defender in the month of August 1857, he was precipitated from the scaffolding of a building which the defender was erecting at Glasgow, in consequence of the said scaffolding not having been properly erected, and being insecure and defective, and sustained severe bodily injury, whereby he was rendered unable to earn a subsistence.

The defence was a denial of liability, and a denial that the scaffolding was defective and not properly erected.

It was the pursuer's duty to carry the materials required for the masons across a scaffolding or gangway, placed over an open space, left for an inside stair, on to the platform on which the men were at work. The building had reached the third floor, the gangway consisting of only four planks. each nine inches broad. Several additional planks having been removed elsewhere on the morning of the accident by order of David Brand, the foreman, the pursuer and the other workmen complained that the gangway was too narrow and dangerous, but no attention was paid to the matter. When the respondent and another labourer were engaged in carrying a stone on a hand-barrow across the gangway, the pursuer being in the rear and the other man in front, they found their progress obstructed by a tub of lime on the The other man passed safely on to the platform, but the pursuer, in making the turn, having no proper space for his foot, placed it on a loose outside plank, which was not fastened to the other four, and which sprang up. pursuer fell to the ground, and was very seriously injured. Several additional planks were added to the gangway the same day.

The defender adduced several workmen who saw the gangway at the time, and who swore that, in their opinion, it was safe enough. The Sheriff-Substitute (Bell) found that the gangway was too narrow, and not constructed or kept

M'AULEY. injury caused by the incompetency of his foreman.

Brownie v. clear with a due consideration to the safety of the work-Master held liable for insufficiency of butable not to any carelessness or fault of his own, but to men. and that the injury suffered by the pursuer was attriemployment, and for whom he was responsible; and found £60 of damages. Sheriff Alison adhered, raising the damages to £80.

> The defender advocated, maintaining that there was no fault on his part, and, if any one was to blame, it was the foreman: that a foreman was a fellow-workman and it was now settled that a master was not liable for the fault of a fellow-workman; that the defender sufficiently discharged his duty by appointing a skilled foreman.

> The pursuer pled that the scaffolding was defective, and that it was made so by the foreman, who caused some planks to be removed on the morning of the occurrence: that a foreman was not a fellow-workman: he was his master's deputy, and used his own discretion in controlling and superintending the men. The master was liable for defects in the foreman employed by him.

> LORD PRESIDENT.—It appears that the platform or scaffold from which the pursuer fell, which consisted of seven planks some days previous, was composed, at the time of the accident, of only four. The alteration is proved to have been made by orders of David Brand, the foreman; and I think the evidence clearly shows that the injury arose from two causes—1st, The narrowness of the space left; 2d, The loose way in which the outside plank was left. pursuer was carrying a hand-barrow along with another person. Being the hindmost, as the other turned inwards he was obliged to turn outwards, and the scaffolding being too narrow, he was obliged to place his foot on the loose outside plank, which rose in the air, and he was precipitated to the bottom. The foreman himself says the accident was owing, 1st, To the scaffold being made too narrow: 2d, To the outside plank not being fastened at the ends. It also appears that the foreman's attention had been drawn to the condition of the scaffold by a man of the name of Deacon, who says he was afraid to carry things across the scaffold, as he considered it unsafe; and the foreman said he would send the men to make it right. Thus the foreman was made aware of the insecurity of the scaffold. and admitted that it was unsafe. It further appears that nothing was ever done; that, on the contrary, he expressly told the pursuer to carry the stone which the other people had left, in consequence of the insecurity of the scaffold. Further, immediately after the accident, the additional planks were put up, which should have been

Dat there will a recommend when you are it is assessed the farmoun Some communication in the straight. Some of the willnesses converge & Source Andrews speak to what they and after the account, states before it.

The constitue then armed Vise the animale responsible in an authorize of OCCUPIEDE A RESERVICE. THE RESERVE HIRSEL WAS DRE THERESE SHEWING AND He is a businer. In temperature the apperturements of the understand in the three ings to summont see, and letter letter the instance has been a be It was he will had the investion of the scaling, who redered the scource planks to be mices some visc ment the additional results after the accident, will desired the pursues to safe the street when the februs र्तिकरते. बार्ट पोन पान माना माना बारान मां गान गानाताल हातार सं दोश acaffe ld

It has been assured as as fine the resear indoment of the Source of Lords in report in the non-limition of masses for injuries received by their servants airmage the medicence of their fellowlabourers, exchaes the cann here made against the defender. I have rigorità des van die date desent die se ente con le locale evals I experience was to determine who was to be removied as a followlabourer. As I was the lev of Empleme I of more concern there is any difference in remembe between it and the law of Scotland. In the Bartonshill case, the cifference between this case and the House of Lords turned, I think on the question whether the renson who immediately contributed to the injury was to be receried as a fellow-labourer or not. We thought he was not but the House of Lords thought otherwise.

The present case appears to me not to fall within the judgment of the Bartonshill case. In the first place, one cause of the injury was the imperfection of the machinery or scaffolding provided on the occasion. I do not understand the judgment of the House of Lords to have proceeded on this that a person who carries on works of this kind, and who is bound to provide proper machinery for his workmen, is not responsible for the consequences which may ensue from the machinery being imperfect in extent or quality, or insecure in point of construction. On that principle, I think the case is I further think the judgment taken out of the case of Bartonshill. in the Bartonshill case has not decided, what the House of Lords may yet decide—that when a person, who carries on a trade of such a kind that he cannot be personally present, and in which he delegates to a foreman his authority to superintend the operations and control the workmen, that the person placed in that position is a fellow-labourer. I have great difficulty in arriving at the corclusion that he is a fellow-labourer. In this case the injury is traceable to the individual acts of the foreman himself. The case might have been made to depend somewhat on this. Whother the person placed in the position of a foreman was a person of known skill, character, and prudence. If the master had proved that he had ongaged an experienced workman to be his foreman—an auxious, skilful, and prudent man—it might have been said, perhaps, that he had then discharged his duties as far as the circumstances of the case would permit. I do not know how that would be. But in

BROWNLIE v. MADLEY. Master held liable for ininjury caused by the incompetency of his oreman.

this case we have no evidence on the subject. We have no evidence save the one act presented to us in this case—that of ordering the men forward when he was told the scaffold was insecure, which cersufficiency of tainly indicates great negligence on his part. If it was left to us to make any inference on the subject, I should certainly think he was not a competent person. On both of these grounds I think we are here out of the case of Bartonshill, and the conclusion I have arrived at is, that the substance of the Sheriff's judgment is right, and I do not think the damages are excessive.

> LORD CURRIEHILL.—I concur in the conclusion to which your Lordship has come, and the grounds on which it is rested. only difficulty arose from the case of Wigmore, cited in the debate. But in all those cases in which an employer was held not liable for the acts of his foreman, it has been on the ground that the foreman was a person competent for the situation in which he was placed. In this case we have no proof on that subject. We do not know what the foreman's experience was—what his skill, what his charac-All we know is, that in the only matter with which he is connected in this case he acted very ill indeed, and which satisfies me he was not fit for the place.

> LORD DEAS.—I agree in the result arrived at by your Lordship, and in the analysis you gave of the evidence. I do not think it can be said that this accident arose from the rashness of the man himself. The question seems to resolve into the master's liability for David Brand.

> I agree in thinking that a foreman who has power to give orders to the men, whose duty it is to provide scaffolding for them, and has power to make it as he thinks proper, and to get it mended if he thinks it necessary, who was the only person who could give orders to the workmen to go upon it, and who did give them orders to do so -a foreman, in these circumstances, is his master's representative, and the master is liable for his negligence. In this case we have no evidence as to what sort of a person this foreman was. His conduct about the scaffolding is certainly not much in his favour. above that, I am satisfied that a foreman, placed in the situation which this person held, cannot be called a collaborateur, in the sense in which that term has been used, both in this country and in Eng-In the case of Wigmore, the distinction does not seem to have been taken between the foreman and the rest of the men employed to put up the scaffold. But I cannot find any trace of its ever having been decided in England, and it certainly never was decided in Scotland, that a foreman employed in the circumstances of this person is to be held a collaborateur, so as to free the master from the consequences of his negligence.

The Court adhered.

30th April 1860.—HOLDER PROPER LINES SOULEY, HOLDER R. Defender.-29 L. J. C. P. 246.

keeper not lin-the for loss of

This action was for the value of a kel er's effects, taken objects effects from a lodging-house in his absence. It was directed against the lodging-house keeper, on the ground of neglect of duty. in not taking due and proper care of the house. The Court gave judgment for defendant.

ERLE, C. J.-I am of opinion that our judgment should be for defendant. On the first owns, the plainted chains to be entitled to recover, on the mere relationship of kniger in the defermant's house: and it is assumed that the law creates a duty on the part of the landlord to take proper care of the goods of his holgen. Now, when one looks to the authorities, to see whether the law creates any such duty, it is clear that no judge or treatise ever affirmed any such proposition. On the contrary, in Caley's case, the liability for the safe keeping of the property of a guest is restricted to innkeepers keeping common inns for the use of wavfarers; and the Judges laid down there distinctly, that a lodging-house keeper is not liable, even if the goods were stolen by his own servants, much less if taken by a stranger. The reason why the law makes an innkeeper liable is, that the wayfarer has often no means of knowing the character of those with whom he may come in contact at the inn, it therefore casts this duty of protecting the goods of his guests on the innkeeper, who, knowing this, has a right of making such charges as may compensate him for such liability. None of these reasons has application to a lodging-house keeper. It is not, however, contended that there is an absolute duty upon such persons to take care of his lodger's goods, but it is said that he is bound to take such due and proper care of his house as a prudent owner would take, and that it was by reason of the defendant not having done so that the plaintiff's goods were stolen. Now, I am averse to affirming, for the first time, the proposition, that a lodging-house keeper is bound to take due and proper care of his lodger's goods. I apprehend that great mischief might be done by imposing on a person undefined duties, the result of which no one can foresee. Considering that a man who lets lodgings may do so to the most wealthy as well as to the poor, if we were to hold that he is bound to take due and proper care of his lodger's goods, we should confirm a most mischievous proposition. What is to be the test of proper care? The habits of a lodginghouse keeper must vary according to the situation of the premises, and a variety of circumstances. In sea-side houses the practice is to leave the outer door open; and it would be very inconvenient if the door was required to be locked all day. So also in a port, where lodgings are taken at short notice, and the lodgers are continually moving in and out. The law is, that the lodger must take care of HOLDER v. his own goods in lodgings, as he must with respect to valuables Souler. about his person when he walks the streets—he may, if he please, keeper not lia-leave them in the hands of the owner for safe custody, or else he ble for loss of may take care of them himself. In Dansey v. Richardson, the prolodger's effects position came to be admitted, that the plaintiff, as a boarding-house

ble for loss of may take care of them himself. In Dansey v. Richardson, the prolodger's effects. position came to be admitted, that the plaintiff, as a boarding-house keeper, was bound to take certain care of the goods of his guests: and it was contended there for the defendant, that even if she were bound to take such care, there was not the least evidence to show the want of it. But the whole tenor of my judgment in that case is distinctly to the effect, that there never was such liability cast on a lodging-house keeper, and that it would be unreasonable to make people liable for goods of which they never had the custody. other Judges who differed from me only adopted my proposition, as I had laid it down at the trial, with respect to the defendant being bound to take some care of the goods, which was not a proposition in dispute in that case. Then, if there is no such duty to take care of the lodger's goods by the mere relation of lodger and lodginghouse keeper, is there such duty where, as is alleged in the second count, the lodger, who is about to quit, allows his landlord to show the apartments to any person who may be desirous of becoming tenant when the tenancy of the lodger expires? I am of opinion that there is not; and that it was the lodger's duty in such cases to put his goods out of the way. If we were to hold otherwise there would be great danger of the lodger conniving with some person to take away the goods, and then make the landlord responsible for the loss. I see nothing in the relation of a lodging-house keeper to justify a guarantee that the person who comes to see the apartments shall do no wrong. I do not say what would be the liability of a lodging-house keeper where he has, by gross misconduct, conduced to the loss of the goods of the lodger; but, in my judgment, he is not responsible for a loss which has arisen, not from his misfeasance, but only from an absence of proper care.—Judgment for defendant.

VAUGHAN v. 12th May 1860.—VAUGHAN, Plaintiff, against THE TUFF-THE TUFF VALLEY RAIL VALLEY RAILWAY Co., Defendants.—L. J. 59. Exch. p. 247. way Co.

way co.
Railway Company not liable for damage by This was an appeal on the part of the defendants against accidental fire, the judgment of the Court of Exchequer. The question caused by sparks from the was, are the defendants liable for the damage caused by an accidental fire, arising from a spark from the engine falling on premises adjoining the railway? The judgment brought under review was against the defendants.

COCKBURN, C. J.—We are all of opinion that the judgment of the Court of Exchequer cannot be upheld. The case must therefore go down for a new trial. I gather from the reading of *Bramwell*, B.,

in delivering the judgment of Court that their views were first Taronax verthat whereas accidents occasionally arise from the use of five in pro- Valley Kin pelling locomotive engines, the occasion of accidents must be taken to be a natural and necessary incident to the use of the for the par Malage of pose of locomoraives: and second. That a Railway Company, who is hanned to uses fire for this purpose, will be liable for any accident that may accident result from its use, afficure they may have taken all possible known caused by precaution to prevent injury; and although there is no proof of ne knowners gligence, execut so far as negligence is implied in the use of fire for the purposes mentioned. I cannot adopt that view. It is at variance with the principle adopted by the Court, The King v. Pearce (4 R and Ad. 30), the authority of which case this Cours is presured to recognise and act on. Though it be true generally that a person who keeps an animal of known dangerous propensities, or uses an instrument from which some manifest danger may arise, may be responsible for an injury occasioned by such animal or instrument, without proof of negligence; vet when the Legislature has sanctioned the use of a particular means for a given purpose (provided every precaution which the nature of the case suggests has been observed), it is not an act for which action lies independent of negligence. It is admitted that the Railway Company have used the fire for the purpose of locomotive engines, and that they have endeavoured to protect the public over whose lands they passed from injury, by resorting to all known means of precaution. It is clear, then, that there is no negligence in fact. Therefore, on the first count, I think the defendants not liable. As to the second count, if the facts alleged in it had been proved and found by the jury, I think that there would have been quite enough to render the defendants liable. But as the Judge told the jury that he thought there was negligence if the injury arose from the mere use of the fire with the locomotive, there is nothing which can lead us to suppose that the jury did not find the verdict for the plaintiff upon the first count. The question in the second count has never been properly decided by the jury. The defendants may be able to show that the injury did not arise from the state of the banks.

Judgment reversed, and plaintiff non-suited.

The second count alleged that the grass was allowed to grow on the bank of the Railway, so as to incur danger to the plaintiff's property: that it had ignited, and was known to the defendants to be liable to ignite, and that, nevertheless, they permitted the danger to continue.

STATUTE 9 & 10 VICTORIA. CAP. 93.

An Act for Compensating the Families of Persons Killed by Accidents (26th August 1846),

Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person; and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused Be it, therefore, enacted by the Queen's Most Excellent Majesty, by, and with the advice and consent of the Lords, spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, That, whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

II. And be it enacted that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused; and shall be brought by, and in the name of, the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

III. Provided always, and be it enacted, that not more than one action shall be for, and in respect of, the same subject matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

IV. And be it enacted, that in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney, a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

V. And be it enacted that the following words and expressions are intended to have the meanings hereby assigned to them, respectively, so far as such meanings are not excluded by the context or by the nature of the subject matter; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender, and the word "person" shall apply to bodies politic and corporate, and the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother, and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

VI. And be it enacted that this Act shall come into operation from and immediately after the passing thereof, and that nothing therein contained shall apply to that part of the United Kingdom called Scotland.

VII. And be it enacted that this Act may be amended or repealed by any Act to be passed in this session of Parliament.

The Statute is applicable to England only.

COMMON EMPLOYMENT.—Servants engaged in, what is it, 122, 160, 232, 236.

COMPENSATION.—Claimable under 9 and 10 Vict., c. 93, on proof of actual damage, 324; held that reasonable evidence of damage was made out, 324.

- Contractor bound to provide against accidents while his workmen on the premises, 7; but after they have left not liable for the succeeding workmen for continuation of a dangerous opening in building, 7; question of, 28; whether case of master and servant, 53, 127; cases where no liability for injury laid on employer, 71, 74, 127; not liable for negligent acts of subcontractors or their workmen, 76, 115, 241; liable for fault or negligence of their workmen, 107-112; held to be servants when engaged in putting out ironstone for lessees of a pit, 145, 152; distinction of contractor from servant of employer, 151; Lord Ivory's views, 151; if work ordered be unlawful employer is liable for injuries, 129, 166, 173; a question of contractor, 193.
- CORPORATIONS.—If there is a duty on it to do certain acts, liable for the negligence of officials in doing or neglecting the duty, 208, 211.
- CRIMINAL ACTS.—Master not liable for criminal acts of servant, 42, 43; master however will not necessarily be relieved though the servant's negligence may infer criminality amounting even to culpable homicide, 202, p. Lord Deas; the bringing of a glandered horse into a public place was indictable criminally, 154.
- CULPA.—General rule culpa tenet suos auctores, 118, 160, 261; fault on pursuer not a bar to damages if remotely connected with accident, 52, 83; on owners as to machinery, 94, 101; as to onus on Railway Companies, 107; fault on pursuer directly contributing, 238, 260-70, 299.
- Damages.—Excessive, new trial, 129; must be actual damages under Lord Campbell's Act 9 and 10 Vict., c. 93. Solatium for wounded feelings due in Scotland, 43, 85; repudiated in England, 129; extent of damages, 120-1.
- Dog.—Owner liable if he knew the vicious habits of the animal, 164. See also Orr v. Fleming, &c., House of Lords, Jurist, vol. 27, p. 364.
- Driving.—Reckless driving of omnibuses, damages on party causing injury, 120. See Master—Servant.
- EMPLOYERS not liable for contractor's negligence, or their servants, 254; question of ownership of horse causing the mischief, 256; not liable to servant for state of machinery when state known to and wrought by the servant, 315; not liable for a party who after complaining of defect still goes on working, 310. (See *Master*.)
- EVIDENCE.—Prima facie evidence of negligence from the accident overcome by proof of the wilful act of a stranger causing the collision, 298; which party bound to prove negligence, 315.
- FAULT on both sides if contributing to injury bars damage, 44, 260; circumstances held not to bar damages, 48; defendant liable if he does not exercise reasonable care to avoid consequences of a plaintiff's fault, 83-4; parent's fault in not looking after children, 217, 221; fault on party injured held to bar claim of damages, 260, 266, 270; see Lord Justice Clerk Inglis's opinion in M'Naughton's case, 266; can there be a balancing of loss, 271; if fault of plaintiff, but remotely connected with accident entitled to recover, 276, 283-7; plaintiff non-suited although fault on servant of Railway in consequence of fault on his own part, 311; the same point, 320.
- FELLOW-WORKMEN.—Held to comprehend workmen of the contractor and various sub-contractors, engaged in carrying on an extensive undertaking

or building, in a question as to liability of master for injuries caused by a workman at the building. 242-4.

FENCES.—Duty of fencing, 6, 78, 322-3; a person going off the public road in a dark night and wandering into dangerous places sustaining injury, is owner liable? 223.

FERRY.—Ferryman liable for value of a horse injured by defective apparatus or machinery at the piers for the landing of live cattle, 155; bound to provide everything necessary for the conveyance of passengers and goods from one side to the other, 155; lessee of ferry hired a steamer and crew to carry his passengers across, owner of steamer held liable for injury sustained by a passenger through the negligence of the crew, 313.

FIRE-DAMP.—Owner of pit liable for proper inspection and examination, 188, 189; fire from engine, Railway Company not liable for accidental burning of adjoining property unless fault or negligence, 333.

FOOTPATHS.—Where no public footpaths no liability to fence, 323.

FOREMAN.—Master held not liable for injury from defective state of an erection executed under the order of a competent foreman, 121; where foreman's act held to imply incompetency, 329; Master held liable for negligence of reddsman in a coal pit whereby injury done to a workman, 325; but reversed by House of Lords, 326; see Lord President opinion in Brownlie, 330.

GLANDERS.—Owner of a glandered horse liable to criminal prosecution for bringing the animal into a public market, 154.

GRADES of Workmen.—Does the fact of the injury arising from the fault or carelessness of a manager, superintendent, foreman, or superior workman, alter the rule of non-liability of master for injuries sustained by a workman when caused by the fault of a fellow-workman, 325, 329, 331; see Lord President's opinion, 330.

HACKNEY Coaches,-Hirer not liable for negligence of drivers, 31, 73.

HARBOUR trustees held not liable for negligence of harbour master or servants, 79, 327; if damages are sustained in course of improvements authorised by the Act, would the trustees be responsible? 83; negligence must be libelled against the trustees for injuries arising from the use of the works, if the damage be not occasioned wilfully, 282; held liable for unsafe state of the docks, 30°3; they having known the danger, and still allowed the dock to be used, 30°9; in the case, also, it was alleged that they had sufficiency of funds to discharge all the duties, including clearing the docks, 30°8; in such circumstances, does a discretionary power of expending money in any of the proper trust purposes become a duty? 30°8; magistrates of a burgh, proprietors of a harbour, and who licensed pilots, held not liable for their negligence, 27.

HAZARDOUS Employment—Servants held to undertake the ordinary risks of the service, 283; miners, seamen, 284; have no claim on master for injuries without negligence on his part, 283, 286.

Horses—Hirers of horses held not liable for negligence of coachmen or drivers, 31, 71; the relation of master and servant does not exist, 31, 71.

ILLEGAL ACTS—A person ordering or employing another to do an unlawful act, whether contractor, or servant, or otherwise, is liable for the consequences of the fault of all the persons engaged in it, 173.

IMPROVEMENT Commissioners held responsible for damage done to property through defective erection and continuing of defective drainage, 310,

grounds of liability being by the statute enabled to reimburse themselves for the consequences of the acts done by them in course of draining, 311.

INEXPERIENCED Workers—Liability held on master for injuries sustained from machinery, 200.

Intoxication—How far a bar to damages where there is fault on the defender, 77. See case of Servant Intoxicated. 22, 44.

JOB masters liable for negligence of the driver of the horses, whether driver paid regular wages or takes his chance of gratuities, 31; hirer of the horses, although owner of the carriage, not liable for him, 31, 71.

JURY—Judge withdrawing case from jury, being of opinion that pursuer was precluded from recovering, by fault on his part, 176; reversed, as being a question of evidence for the jury, 179.

Lodging-House keeper not bound to take more care of her lodgers' goods than a prudent person would take of her own, 185; liable for gross negligence of her servant, 186; not liable for a theft, where no negligence, 187; not liable for loss of lodgers' goods, 333; not bound to take "proper" care of them, 333; what is proper care? 333; lodger bound to take care of his own articles and effects, 332; rule different from keepers of common inns, 334; gross misconduct of lodging-house keeper may render liable, 334.

MACHINERY—Owner bound to have sufficiency, 94, 287; if he has done everything in his power to ensure its sufficiency, would he be liable? 101; liable for defective machinery, 112, 130, 156, 273, 306; case of machinery, 314; no fault held on master as to machinery, 125; state of machinery known to servant, and wrought by him, bars claim against master, 314. See, also, 328, 329.

MAGISTRATES of burghs, when charged with preservation of the streets, liable for damage arising from unfenced pits, 1; for accidents caused by want of repairs of streets or obstructions, 208; magistrates owners of town's property, liable for sufficiency and proper fencing, 317; question whether roads and paths within burgh were ever taken by magistrates as public roads, 318; magistrates proprietors of a harbour, and who licensed pilots, held not liable for damage caused by their culpable conduct, 27; difference between corporate duties and duties adjeced to the office of magistrates by statute, and for which the town's funds are not liable, 210, 216.

Managers—Master held liable in Scotland to a workman for injury sustained through fault of underground manager, 301.

MASTER—Liability to servant, not liable for negligence of servant, or negligence of other servants in common employment, without fault on his part, 51, 75, 121, 122; principles of the liability discussed, 51, 52; is master liable without fault, 101, 163-4; circumstances where no liability held, 327; liable for his neglect towards them, 144; held bound to have sufficiency of machinery, and not to expose them to undue risks, 125, 253; to take due and reasonable care of them, 253; not liable for injuries sustained by rashness or carelessness on their part, 168, 171, 190, 321; not liable for injuries caused by fellow-servants in the same employment, 122, 160, 224; what is common employment? 122, 160, 232, 236; is master liable for foreman? 121, 329, 325, 326; not liable for pure accident, 125, 128; where master was held liable to servant for injury caused by fault of fellow-servant, 130-6; where servant held not to have been in master's service, 137; but reversed, 143; Lord Ivory's opinion in Brassey's case, 163; a servant undertaking known duties barred from claiming damages, for

alieged paneity of hands to do the work, and injury thereby sustained. 175; isability to inexperienced workers as regards machinery, 200; special cree; held it fiscoland that master liable for injuries caused to a servant by the tank of a tellow-servant, 221; but reserved in the House of Lords, and reliability held, 224, 225, 287, 242; held not liable for injury if he does his best to appoint competent workmen, 252; question of sufficiency of machinery, 277; strangers assisting servants under same rule as to non-liability of master, 274; if out of line of duty master not liable, 281; harardons works servants held to take the risks, 289-6; if servant, after complaining of defect continues to work, harred from damages against master, 298; held responsible for an underground manager, 201; held not liable to servant, although guilty of negligeness in consequence of the negligenes and incompensance of foroman, 529; held liable for insufficiency of seaffolding, and incompensance of foroman, 529; Lord President's opinion, 329, 280; and Lord Deas, 882.

Master-Liability to third parties, not liable if servant are wantendy, and out of his service, 26: liable for negligence of servant in running over a child by horse and cart, 28: liable for servant's negligence, although no blame attaches to himself, 30, 42, 48, 49, 53; law on this subject discussed, 34 40; where servant a habitual drunkard liable, 44; not necessarily liable if only one act, 46: not liable if servant go out of the line of his day, or employment, 47: nor if he does not authorise the act, 48; whether a case of master and servant, 53: not liable for an unlawful and manthorised act, 55: cases where relation of master and servant held not to exist, 51, 73, 74; master held not liable when erection made under charge of a competent person as foreman, 121: operations in a mine held to be as master and servant, and liable, 145, 152; liable for proper ventilation of mine, 187. See (howers.

MATERIALS - Master liable for sufficiency, 287; defective scaffolding, 328. See also 121

NEGLECT of duty renders party liable to criminal prosecution, 16%

NEGLIGENCE of master renders liable, 51, 75, 121, 122, 144, 287; of mercant harm claim of damage, 190; must be libelled against statutory trusters, 282; negligence held against canal and railway directors in the use of a swing bridge over a canal in continuation of a public road, and found liable, 50%; which party bound to prove negligence, 88, 296, 316.

Nuisance on property, or by use of it, renders owner liable, 245, 252 321. See also M. Callum v. The Forth Iron Company, 12th June 1860.

Onus of proof in case of injuries, 63, 82, 107; collisions of trains on same line, onus on company to prove due care, 316; if accident is consistent with absence of negligence, plaintiff held bound to prove negligence, 316; see also 296, 88.

Owners of Property—Held liable at one time in England for injury canned by the workman of a sub-contractor engaged on the property, it, 78, 74; rule now altered, 110, 111; rule in Scotland, 115, 149; liable for insufficiency of subject, and damage thereby occasioned, 150, 248, 253; milable for unfenced pits on property, see 6, 45, 77; see shing 321; not liable for negligence of tenants, in the negligent use of a proper apparatus, 66, 69; nor for contractors or their workmen, 107, 112, 110, 1100 for injuries sustained on their property where there is no thoroughfare, 248, 295, 323; held liable for injuries done by servants in using fire to clear a moor, 9; not liable for injury by the falling of a tree cut by his servants which he had not ordered, or authorised to be cut down, 13; law of respon-

sibilities for servants in such circumstances, 15, 19; held liable for insufficient fencing, 29; liable if he order work to be done of an unlawful kind, 173.

PARENTS, duty to look after children wandering to dangerous places, and action for injuries barred in such cases, 221, 235, 289, 295; child barred from claiming damages when grandmother, in whose charge he was, guilty of negligence contributing directly to injury, 311.

Passengers—May be a passenger lawfully in train without a ticket, 260; claims under assurance tickets, 197. (See Railway Passengers.)

QUARRY, imperfect state of, blasting rock, owner held liable for injuries to workmen, 63.

RAILWAY COMPANIES, liability for negligence of servants in collisions, 52; not entitled to prior notice under their act for injuries in carrying passengers, 88; liable for imperfect state of line, and over-driving, 86-90; admission by Company of the death of a passenger by negligence in an issue will not preclude passenger from showing the aggravating circumstances, 91; latent defects of engine, carriages, or line, would Company be liable, 102-3; if any insufficiency proved, defenders must show that accident did not arise in consequence of it, 104; not liable for injuries to a passer by caused by a workman of the contractor for the construction of the line, 107, 112; might be liable for damage to property adjoining caused by imperfect construction of railway, 251, 252; not liable to a servant for injuries caused by negligence of fellow-servant, 122; liable for loss of luggage, 154; cannot free themselves from the consequences of collisions by contracting with other parties to run the trains, and stipulate that the contractors would only be liable in a limited sum for accidents, 167; their duties and responsibilities as to fencing the line, 174; circumstances where no liability attached for injury to a servant, 175; question of contractors working the line, and liability for injuries, 197; not liable for injuries through negligence of servants of contractors for delivering the goods in towns, 254-8; question if fault of company whose servant injured, 272; Company not liable for injuries to servant out of the line of his duty, 281; brakesman not entitled to act as pointsman, and non-liability for injury sustained in his doing so, 282; prima facie evidence of negligence of collision overcome by proof of the wilful act of a stranger causing the accident, 296; held liable for death of a workman engaged mending waggons, and crushed by engines approaching, negligence found on Company and servants, 298; bound to take reasonable care in use of canal connected with railway, and found liable for death of a person falling into canal by swing bridge being left open, 304; freed from damages, although servants guilty of negligence in consequence of fault on injured party, 311; which party bound to prove negligence, 315; in cases of collision of trains on same line, presumption against Company, 316; if accident is of a nature consistent with absence of negligence, plaintiff must prove case, 316; held liable for careless management of a "switch," although self-acting, and had recently been inspected by a servant working near, but not stationed at it, 324; not liable for accidental fire to neighbouring property from sparks from locomotive, 334; mere fact of using locomotive accompanied with risk not fault, 334; if the Company allow grass to grow on the banks, so as to be dangerous from ignition, and when such ignition has formerly taken place, might be liable as for negligence, 385; held liable for injuries sustained by a servant at a

:...

station by goods falling on him, by having been imperfectly stored on the platform, 106.

RAILWAY PASSENGERS' ASSURANCE—Held that a person insured who suffered injury is not entitled to compensation for loss of business or time, but only for expenses caused by the injury, including medical attendance, 197; a passenger, on coming out of a train at the end of a journey, and falling between the carriage and the platform, held to be under the risk of the assurance on the journey, 197.

RASHNESS of servants bars claim for injuries against master, 190, 285.

ROAD TRUSTEES—Allowing stones to remain improperly on road, causing damage, held liable, 23; held liable in negligence for not properly shutting up an old road, whereby injuries were sustained by a traveller, 41; held liable for imperfectly fencing road under repair, 44; held liable for negligence of servants, 50; held liable in Court of Session for injury caused by obstruction on road by acts of contractors and workmen, but reversed in House of Lords, 55, 61, 70; and rule now that trustees not so liable, 57.

RECKLESS DRIVING, 21, 123. See also Williams v. Richards, 3 Car., and K., p. 81.

SCAFFOLDING—Master held liable for sufficiency when erected by his servants, 287; held not liable in England for injuries caused by fall of scaffolding when erected under superintendence of a competent foreman, 121; held liable in Scotland in a case of circumstances, and no evidence of competency of foreman, 327; relevancy of statements as to insufficiency of ladder, 309, 310.

SERVANT—Is he bound to take the ordinary risks of the service? 124; not bound to expose himself to undue hazard, 51; in cases of "seen danger," his duty is not to work, 51, 167, 171; not every circumstance of danger, however would entitle him to stop working, 17, 172; if rash or careless of himself has no claim for damage against master, 285, 321; no claim when injury caused by fault of fellow-workman at same employment, 50, 122, 124, 233, 242; what is common employment? 224, 237; master would be liable if servant, at the time of the injury, was not at his work, 124; see also 238; master not liable if servant acting out of line of duty, 46, 166; though there be fault on master, servant not entitled to go on taking undue risk, 168, 173; rashness and negligence of servant bar damages, 190, 319: if servant, knowing a defect, continues at work, he is barred from claiming damages for injury therefrom, 298; fault on servant held to bar action, 319; circumstances held to bar claim, 314; see also 321; disregarding rules of work, 321.

SINGULAR SUCCESSORS found liable for injury caused by unfenced pits opened by his predecessors, but allowed to continue with insufficient fence, 6; see also 45.

Shipowners—Action of damages held relevant against owner by a seaman for neglecting to keep on board a sufficient supply of medicines, as provided by 7 and 8 Vict., c. 112, and this notwithstanding the penalties in the Act on the owner, 184, 185; held not relevant the statement that, by the unseaworthiness of the ship, the seaman's health was injured, the declaration not alleging prior knowledge by the owner, 184; owner of steamer leased out held liable for negligence of the crew appointed by him, 318.

Solatium due for wounded feelings of relatives, in cases of death by negligence, 11; not acknowledged in the law of England, 129; action held relevant for solatium alone, 85; is it claimable by brothers and sisters, 216.

Statute 8 and 9 Vict., c. 93; as to compensation for injury from accidents, (England,) 336.

STEAMER—Fault on pursuer held not contributing directly to collision, not a bar to action for damages, 120; owner of steamer leased to carry passengers held liable for negligence of crew. 313.

STRANGER assisting servants, and injured by negligence of the other servants, held in England to have no claim for damage against the master, who did not know of the circumstances, and not negligent, 274-276; held to fall under the same rule as injuries to fellow-workmen, 274; whether master liable for injuries to a stranger assisting, arising from defective machinery used in the work; held relevant for an issue, 207.

SUB-CONTRACTOR liable for injuries caused by their workmen, 76, 115.

TENANTS of mines under a lease, employing or contracting with parties under them to do certain portions of the work, of taking out the ironstone or coal, held a case of master and servant, and not contractor, and the tenant held liable for injury caused by the careless workings, 145, 152.

TRADESMAN liable for insufficiency of work, 257-259.

TRESPASSERS—Parties trespassing, and sustaining injury, barred from claiming damages from owners of premises, 289; see cases of slight trespass held not to bar claim, 6, 77; see page 321; persons wandering off the road in the dark, and sustaining injury, who liable? 323; owner not entitled to injure a trespasser by negligence, if owner see a trespasser, and while sporting fire at a mark so carelessly as to hurt him, he would be responsible, 276: see 142.

VENTILATION OF MINES—Owner or lessee liable for imperfect ventilation, and want of examination, and from fire-damp explosions, 187-9; not liable if he can show that he has done his duty in this respect, 328.



TABLE OF TEXES

France				Injend	-	
Ainsile		Sever				. 7
Airie		Interior				. 34
Alian		Y en	-		_	
Allan		Simples and	Thurs			. 45
Alan		Tier WAIL				. 11
Also		Term				. 296
Anderson	٠.	Proper & Co	muser			. 23
Anderson		Invie	. •			. 29
Baird	D.	Esmittee.				. 29
Baird	F.	Aúdie & Mi	Tone			. 167
Balfour	77	Bant & Br	DVI.			. 29
Barnes	ख्ड.	WATE				. 322
Bird	75.	The Great I	Korále	Laiv.	8 * .	. 315
Birkett	P	Whitelever	June	ior Rail	WET COL	224
Black	·	Cacoul				. 6
Blake	ve.	Midiani Bu	Dvry (Company	г.	. 129
Blyth		Tuplin				. 323
Brash and others	DET.	Scool	_			. 90
Bridge	ver.	The Grand	Juncii	on Rails	TET CO.	52
Brownlee	ver.	M Anley				329
Browniee. June.	ver.	Tenant & C	u. and	Gardine	f.	. 197
Brown	per.	M Gregor				. 10
Brydon or Marshall and others.	DET.	Omea & Cle	reland	Iron and	Coal C	a. 137
Bush	ner.	Steinman	_	_		. 3
Callendar	per.	Eddington	-	-		. 149
Carpne	ver.	The London	and E	righton	Railway	- 86
Chapman	ver.	Parlane		•		. 29
Christie	ver.	Griggs				. 7
Clark or Reid, and others	ver.	The Barton	shill Co	oal Comp	pany .	. 221
Clayards	rer.	Dethick				268
Cleghorn	cer.	Taylor &c. (Spittal	's Truste	es) .	. 243
Clyde Shipping Company	rer.	River Clyde	Truste	ees		. 79
Cook and Children	ver.	Bell .		•		283
Cook or Haggart	rer.	Duncan	•	•		287
Couch	rer.	Steele				. 183
Croft		Alison	•	•		. 25
Dalzell		Tyree and o		•		. 813
Dansey		Richardson		•		185
Dargie	ver-	The Mag. &	Town (Council e	of Forfar	80£

TABLE OF CASES.

Pursuer.	Defender.	Page
Davidson	ver. The Monkland Railway Company	217
Davis	ver. Mann	83
Degg	ver. Midland Railway Company .	274
Dow	rer. Brown & Company	85
Dowell	ver. The General Steam Navigation Co.	278
Duckworth	rer. Johnston	324
Ellis	ver. Sheffield Gas Consumer's Company	173
Findlater	ver. Duncan	55
Fraser and Father	ver. Dunlop and Montgomery	28
Gibb	ver. The Trustees of the Liverpool Docks	308
Gordon	rer. Davie	70
Gray	ver. Brassey	156
Gray & Co.	ver. Lawson	328
Greenhorn, A. J.	ver. Addie and Millar	216
Greenland	ver. Chaplin	119
Griffith	ver. Gidlaw	314
Gunn	ver. Gardiner	21
Hamilton	ver. The Caledonian Railway Company	260
Hardcastle	ver. The South Yorkshire Railway Co.	321
Hardie	ver. Addie, Millar, and Rankin .	301
Harris	ver. Baker	11
Hill	ver. Caledonian Railway Company .	203
Hislop	ver. Sir P. C. Durham	77
Hobbitt	ver. London & North Western Rail. Co.	107
Holder	ver. Soulby	333
Hood or Cargill	ver. The Dundee and Perth Railway .	104
Horridge	ver. Willoughby	155
Hunter	rer. The Edin. & Glas. Union Canal Co.	48
Hutchinson	rer. The York, Newcastle & Berw. Rail.	122
Innes	ver. The Magistrates of Edin., & others	1
Itchen Bridge Company	ver. The Local Bd. of Health, Southmp.	311
Johnston	ver. The Shrewsbury Railway Company	167
Lord Keith	ver. Keir	8
Kerr	ver. The Magistrates of Stirling .	317
Knight	ver. Fox	127
Lamb	ver. Lvon	61
Latch	ver. The Rumner Railway Company .	296
Laugher	ver Pointer	31
Lennan	ver. Addie and Miller	325
Linwood	ver. Hathorn	12
Lenaghan	ver. The Monkland Iron and Steel Co	279
Little	ver. The Summerlee Iron and Coal Co.	207
Littledale	ver. Lord Londsdale	37
Lygo	ver. Newbold	195
Lynch	ver. Haggart	273
Lyon	ver. Martin	54
Lumsden	ver. Russell & Son	238
Manby	ver. The St. Helen's Canal and Railway	304
M arshall	ver. The York, Newcastle & Berw. Rail.	154

	TABLE OF CASES.	249
Firen	To readers	
	** .	Luta
Meteali	er. Hetherington	25.
Miliar	rer. Road Trustees	. 44
Millar	rer. Harvie	. 43
Milligan	-v Wedge	. 74
Mitchell	ere Crasweller	. 166
Morris	ver. The Monkland Railway Comp	•
Morton	er. The Edinburgh and Glasgow	Rail. 91
Mackenzie	~r. M·Leod	. 46
M'Glashan	er. Pundee & Perth Railway Com	ban's 103
M'Guire	eer. The Bartonshill Coal Company	r . 2%%
M'Intosh or M'Atdey	rer. Wm. Fernie. Buist & Co	. 93
M Intyre	rer. Reilly	. 327
Mackay	rer. Waddell and others .	. 22
M'Kechn';	ver. Henderson	inst.
M'Laren	rer. Rae	. 42
M·Lauchlan	cer. Road Trustees	. 41
M·Lean	ver. Russell, M'Nee & Co	. 115
M·Naughten	rer. The Caledonian Railway Com	pany 260
M·Neill	rer. Wallace & Co	. 168
Neilson's Executors	rer. W. Rodger & Sons	. 190
Neilson	rer. William Dixon	. 130
Nisbett	ver. Dixon & Co	. 145
O'Brien	rer. Burn	. 200
Ogilvie and others	rer. The Magistrates of Edinburgh	. 26
O'Neil	ver. Neilson	. 299
Overton	rer. Freeman	. 128
Paterson	rer. Monkland Iron and Steel Con	pany 125
Parnaby	rer. The Lancaster Canal Compar	
Paterson	rer. Wallace & Co	. 176
Peachy	ver. Rowland	. 166
Pollock	ver. Wilkie	257

Priestly

Rankin

Rapson

Reedie

Quarman

Randleson

 \mathbf{R} ver. Henson 154 R rer. Samuel Low 165 Rigby rer. Hewitt 120 Rosewell ver. Prior 5 Ruck rer. Williams 310 ver. Eastern Counties Railway Scrip 175 Senior ver. Ward 319 Seymour ver. Maddox 128 Shiells ver. The Edinburgh & Glasg. Rail. Co. 254 Skinner ver. London and Brighton Railway Co. 316 Sly ver. Edgley, 33 Smith ver. Milne

ver. Fowler

rer. Burnett

rer Murray

rer. Cubitt

ver. Dixon & Co.

ver. The London & North Western Rail.

50

71

53

152

76

107

350

TABLE OF CASES.

Pursuer.		Defender.			
Sneddon	ver.	Addie, Millar & Rankine 9	;е 18		
Sutherland		The Monkland Railway Company 28	1		
Swift		Christie 19	3		
Sword	rer.	Cameron and Galletly 9	3		
Statute 9 and 10 Vict., cap. 93.			6		
Tarrant	rer.	Webb 25	2		
Theobald	rer.	Railway Passengers' Assurance Co. 19	5		
Tuff	ver.	Warman 27	6		
Vaughan	ver.	The Tuff Valley Railway Company 334	4		
Vose	ver.	The Lancashire & Yorkshire Rail. 298	8		
Waite	ver.	North Eastern Railway Company 31:	1		
Wallis	ver.	Manchester and Lincolnshire Rail. 174	4		
Ward	rer.	Lee	1		
Weston & Sons	rer.	Corporation of Tailors of Potterrow 6	6		
Whitelaw	rer.	Moffat and Pollock 11:	2		
Whitehouse	rer.	Birmingham Canal Company . 289	2		
Wigget	ver.	Fox	1		
Wigmore	ver.	Jay	1		
W7:11:ama		Claugh	^		



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PUBLISHED BY

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